(14)

No. 03-9659 *** CAPITAL CASE ***

Title: Thomas Joe Miller-El, Petitioner

v.

Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed: April 2, 2004

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (00-10784)

Decision Date: February 26, 2004

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 1 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 3, 2004)
Apr 20 2004	Order extending time to file response to petition to and including May 28, 2004.
May 27 2004	Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed.
May 28 2004	Brief of respondent Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
May 28 2004	Brief amici curiae of Former Prosecutors and Judges filed.
Jun 8 2004	Reply of petitioner Thomas Joe Miller-El filed. (Distributed)
Jun 9 2004	DISTRIBUTED for Conference of June 24, 2004.
Jun 28 2004	Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Aug 3 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 2, 2004.
Aug 27 2004	Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed.
Sep 2 2004	LODGING submitted by both parties received.
Sep 2 2004	Brief of petitioner Thomas Joe Miller-El filed.
Sep 2 2004	Joint appendix filed. (Jt. appendix in two volumes).
Sep 2 2004	Brief amici curiae of Former Prosecutors and Judges filed.
Sep 2 2004	Brief amicus curiae of California filed.
Sep 29 2004	SET FOR ARGUMENT ON Monday, December 6, 2004.
Sep 30 2004	CIRCULATED.
Oct 6 2004	Extension of time within which to file respondent's brief on the merits to and including October 28, 2004.
Oct 28 2004	Brief of respondent Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Nov 8 2004	Record received from U.S.C.A. - 5th Circuit. (1 box)
Nov 23 2004	Reply of petitioner Thomas Joe Miller-El filed. (Distributed)
Nov 26 2004	Record received from U.S.D.C. - Northern District of Texas. (5 boxes)
Dec 6 2004	Argued. For petitioner: Seth P. Waxman, Washington, D.C. For respondent: Gena Bunn, Assistant Attorney General, Austin, Tex.
Dec 7 2004	Letter from counsel of record for the petitioner regarding oral argument received. (Distributed).

(11)

03-9659

No. 03-____

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

FILED
APR - 2004

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. §§ 2254(d)(2) and (e)(1).

TABLE OF CONTENTS

Page

CAPITAL CASE—QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

I. THE FIFTH CIRCUIT IGNORED THIS COURT'S EXPLICIT GUIDANCE REGARDING THE PROPER ANALYTICAL FRAMEWORK FOR EVALUATING THE MERITS OF PETITIONER'S *BATSON* CLAIM UNDER 28 U.S.C. § 2254. 8

A. The Court of Appeals Failed To Follow This Court's Direction To Consider Fully Evidence Of A Pattern And Practice Of Discrimination. 10

B. The Court of Appeals Failed To Follow This Court's Direction To Weigh The Evidence That The Prosecutors Used Jury Shuffles To Manipulate The Racial Composition Of The Jury. 13

C. The Court Of Appeals Failed To Follow This Court's Guidance To Consider The Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans From The Jury. 15

1. Views on the death penalty 15

2. Minimum sentencing 18

TABLE OF CONTENTS—Continued

Page

D. The Court Of Appeals Improperly Accepted Without Question The State Court's Credibility Determinations And Failed To Follow This Court's Guidance Regarding Similarly Situated Venire Members. 20

II. THIS CASE IS OF PARAMOUNT IMPORTANCE. 26

CONCLUSION 27

APPENDIX A: Constitutional and Statutory Provisions 1a

APPENDIX B: Opinion of the United States Court of Appeals for the Fifth Circuit, *Miller-El* v. *Dretke*, No. 00-10784, dated Feb. 26, 2004 ..... 3a

APPENDIX C: Opinion of the Supreme Court of the United States, *Miller-El* v. *Cockrell*, No. 01-7662, dated Feb. 25, 2003 ..... 23a

APPENDIX D: Voir Dire Transcript Excerpts 67a

TABLE OF AUTHORITIES

CASES

Page(s)

Banks v. *Dretke*, 124 S. Ct. 1256 (2004) 26
Batson v. *Kentucky*, 476 U.S. 79 (1986) ..... i, 2, 4, 14, 20
Chambers v. *State*, 784 S.W.2d 29 (Tex. Crim. App. 1989) 12
Hernandez v. *New York*, 500 U.S. 352 (1991) 8, 14, 20
Huffman v. *State*, 450 S.W.2d 858 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972) 18
Kyles v. *Whitley*, 514 U.S. 419 (1995) 26
Miller-El v. *Cockrell*, 534 U.S. 1122 (2002) 7
Miller-El v. *Cockrell*, 261 F.3d 445 (5th Cir. 2001) 1, 15
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) ..... i, 1, 2
Miller-El v. *Dretke*, No. 00-10784, 2004 WL 352542 (5th Cir. 2004) 1
Miller-El v. *State*, 748 S.W.2d 459 (Tex. Crim. App. 1988) 2
Miller-El v. *Texas*, 510 U.S. 831 (1993) 6
Reeves v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) 9, 20
Swain v. *Alabama*, 380 U.S. 202 (1965) 5
Williams v. *Taylor*, 529 U.S. 362 (2000) 27

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1 2
28 U.S.C. § 2254 ..... *passim*
28 U.S.C. § 2254(d)(2) ..... *passim*
28 U.S.C. § 2254(e)(1) ..... *passim*
Rule 10(a) i

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals denying habeas relief (App. 3a-22a) is reported at 2004 WL 352542. The previous decision of this Court, remanding the case to the Fifth Circuit for issuance of a Certificate of Appealability (COA) and consideration of the merits (App. 23a-66a) is reported at 537 U.S. 322 (2003). The opinion of the court of appeals denying a COA is reported at 261 F.3d 445 (5th Cir. 2001). The opinion of the district court and the findings of the magistrate judge that it adopts are unreported but available in the Joint Appendix (JA) to the merits briefs filed in this Court in *Miller-El* v. *Cockrell*, No. 01-7662, at JA 942-947 and JA 898-941, respectively. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding

to the trial court (JA 832-836) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 873-879) and the second opinion of the Texas Court of Criminal Appeal (JA 873-879) are unreported. Selected excerpts from the *voir dire* transcript are included at App. 67a-68a.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment and 28 U.S.C. §§ 2254(d)(2) and (e)(1) are set forth at App. 1a-2a.

INTRODUCTION

This Court has already expended considerable time and resources attempting to correct the Fifth Circuit's begrudging approach to claims of discrimination in jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and that court's myopic application of *Batson* to this very case. In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), this Court reaffirmed *Batson's* vitality by "reviewing in some detail the extensive evidence concerning jury selection procedures" in petitioner's trial (App. 28a), concluding that petitioner had identified multiple evidentiary sources to support an inference of purposeful discrimination, and ruling that the court of appeals should have issued a COA and afforded meaningful review to petitioner's claims. This Court also provided a detailed roadmap for deciding petitioner's appeal on the merits, including clear guidance on how to evaluate the specific evidence pertaining to the determinative final step of the *Batson* inquiry: whether, despite their protestations to the contrary, the prosecutors here discriminated purposefully in excluding all but one African-American veniremember from petitioner's capital jury. App. 35a-44a.

Yet on remand, the Fifth Circuit flouted this explicit guidance, reverting instead to the same empty approach this Court specifically rejected in *Miller-El*. App. 38a (court of appeals erred by failing to "give full consideration to the substantial evidence petitioner put forth in support of his *prima facie* case" and by instead accepting "without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial"). Thus, whereas this Court in *Miller-El* specifically noted the state courts' failure even to mention the disturbing historical record of discrimination in jury selection established by the prosecutor's office (*id.* at 44a), the Fifth Circuit *again* ignored that failure and itself dismissed this sordid history as irrelevant to the ultimate issue and superseded by the state courts' finding of benign prosecutorial intent. *Id.* at 9a-10a. Whereas this Court further noted that the prosecution's use of "jury shuffles" to remove African-Americans from the front of petitioner's venire panel "raise[d] a suspicion that the State sought to exclude African-Americans from the jury" (*id.* at 43a), the Fifth Circuit dismissed this prosecutorial conduct on the irrelevant ground that petitioner's counsel, too, had used jury shuffles. *Id.* at 10a. Whereas this Court concluded that the prosecutors had engaged in disparate questioning of African-American and white jurors in petitioner's case, and faulted the Fifth Circuit for concluding otherwise (*id.* at 39a-40a), on remand the court of appeals *again* reached the contrary conclusion, this time by reciting almost *verbatim*—but without attribution—the reasoning of the lone dissenter in this Court. *Id.* at 10a-18a. And finally, despite this Court's express direction to consider these factors—history of discrimination, jury shuffles, and disparate questioning, as well as the racially disproportionate strikes themselves—in evaluating the prosecutors' credibility in denying discriminatory intent, the Fifth Circuit *again* concluded that "the credibility of the reasons is *self-evident*." *Id.* at 11a. (emphasis added).

In *Batson* itself this Court sought to make meaningful the Constitution's prohibition against intentional race discrimination in jury selection by ensuring that prosecutors'

peremptory strikes were not rendered "immune from constitutional scrutiny." 476 U.S. at 92-93. The Court recognized that if prosecutors were allowed to rebut the defendant's *prima facie* case of discrimination with general assertions of non-discriminatory motive, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race . . . 'would be but a vain and illusory requirement.'" *Id.* at 97-98 (quoting *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935)). In *Miller-El* this Court sought to give greater substance to *Batson's* promise by carefully outlining how lower courts should review circumstantial evidence of purposeful discrimination in the jury-selection context. But the Fifth Circuit here, in the face of this Court's vacatur of its prior decision and remand to consider petitioner's appeal in the light of this Court's opinion, again "accept[ed] without question the state court's evaluation." If that decision is allowed to stand, the protections this Court set forth in *Batson*, as well as the requirements of § 2254, will be but "vain and illusory," despite this Court's ruling.

It is critically important that this Court review the Fifth Circuit's decision, therefore, for three interrelated reasons. *First*, at a minimum, the Court should affirm its supervisory authority to prevent lower courts from ignoring its explicit direction regarding the proper application of this Court's precedents. *Second*, this Court should grant review to vindicate its objective in granting review the first time—to ensure that *Batson* retains meaning by providing an analytical framework for the lower courts to follow in evaluating the evidence under the three-step *Batson* inquiry. The Fifth Circuit's reaction to this Court's remand suggests that unfortunately, although the Court's initial *Miller-El* opinion painstakingly presented a clear and thorough analysis of the relevant evidentiary factors and their significance, that alone will not suffice to assure faithful implementation of *Batson* unless this Court provides a similarly exacting model of the appropriate methodology for evaluating evidence under the applicable standards of proof. *Finally*, this Court should grant review to provide similar guidance to the lower courts regarding the evaluation of evidence under 28

U.S.C. §§ 2254(d)(2) and (e)(1). This case provides a uniquely effective and important vehicle to clarify the application of these statutory provisions, because they "embod[y]" the appropriate degree of deference to trial court determinations of the ultimate question of discriminatory intent under *Batson*. App. 37a. In short, if the Fifth Circuit's uncritical rubber-stamping of the state court's determination of no purposeful discrimination in *this* case is allowed to stand, then neither the substantive protections of *Batson* nor the procedural safeguards of §§ 2254(d)(2) and (e)(1) retain meaning.

STATEMENT OF THE CASE

In 1986 petitioner Thomas Joe Miller-El—an African-American defendant—was convicted of capital murder and sentenced to death by a jury from which the prosecutors had excluded 10 of the 11 African-Americans qualified to serve by striking them peremptorily. *See* App. 23a.

After the completion of *voir dire* for jury selection, petitioner moved to strike the jury due to purposeful racial discrimination in its selection, based on the then-controlling precedent of *Swain* v. *Alabama*, 380 U.S. 202 (1965), which required petitioner to show that the "prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service." App. 25a. At the *Swain* hearing, "petitioner presented extensive evidence" of such a pattern and practice of discrimination by the Dallas County, Texas, District Attorney's office. *Id.* The trial judge, however, concluded that while racial discrimination in jury selection "'may have been done by individual prosecutors in individual cases,'" there was no evidence that indicated a "'systematic exclusion of blacks as a matter of policy by the District Attorney's office.'" *Id.* (internal citation omitted). The motion to strike was therefore denied, and petitioner was tried, found guilty, and sentenced to death.

While petitioner's appeal was pending, this Court decided *Batson* v. *Kentucky* and in so doing "established its

three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause." App. 25a. "First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." App. 25a-26a (internal citations omitted).

The Texas Court of Criminal Appeals "acknowledg[ed that] petitioner had established an inference of purposeful discrimination" under *Batson* step one, and remanded to the trial court for a *Batson* hearing. App. 26a. At this post-trial hearing, which took place "a little over two years after petitioner's jury was empaneled," the trial court admitted all of the evidence submitted at the *Swain* hearing as well as additional evidence and testimony. *Id.*

The trial court concluded, however, that petitioner's evidence failed to "even raise an inference of racial motivation in the use of the state's peremptory challenges" and therefore petitioner had failed to make out a *prima facie* case of discrimination as required under *Batson* step one. App. 26a. The court went on to conclude, however, that the State would have prevailed on steps two and three in any event, because the prosecutors "had offered credible, race-neutral explanations" for each of the 10 African-Americans excluded. *Id.* The trial court also "found 'no disparate prosecutorial examination of any of the veniremen in question'" and found "'that the primary reasons for the exercise'" of the peremptory challenges against the African-American veniremen in question was "'their reluctance to assess or reservations concerning the imposition of the death penalty.'" *Id.* (internal citation omitted). "There was no discussion of petitioner's other evidence." *Id.*

The Texas Court of Criminal Appeals denied petitioner's appeal, and this Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831 (1993). After unsuccessfully pursuing

state habeas relief, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254, raising several claims, including a claim that the prosecutors had selected his capital jury in violation of *Batson*. Although the federal magistrate judge who considered the merits of the *Batson* claim concluded that only a pattern and practice of discrimination in jury selection could explain the "appalling" statistics regarding the exclusion of African-Americans from jury service in Dallas County, he considered such evidence relevant only to whether petitioner had established a *prima facie* case, and specifically declined to consider it in deciding the ultimate question of purposeful discrimination. *See* App. 26a-27a; JA 919.

The United States District Court adopted the magistrate judge's recommendations and denied relief. App. 27a. The district court denied petitioner's application for a COA, as did the Fifth Circuit. *Id.*

This Court granted certiorari. *Miller-El* v. *Cockrell*, 534 U.S. 1122 (2002). The Court—with a lone dissent—had "no difficulty concluding that a COA should have issued." App. 38a. The Court identified two fundamental flaws in the Fifth Circuit's analysis. First, the Fifth Circuit erred by deciding the merits of the underlying constitutional claim rather than the "debatability" of that claim as is required in determining whether a COA should issue. *Id.* at 39a. Second, in addressing the merits of petitioner's claim, the Fifth Circuit erred in its analysis and evaluation of petitioner's evidence. App. 38a (court of appeals erred by failing to consider fully all of the relevant evidence including that in support of petitioner's *prima facie* case, and by accepting "without question" the state court's credibility determinations). To correct the Fifth Circuit's flawed approach, this Court set forth an analytical model for evaluating the merits of a *Batson* claim under that decision's three-step framework. Applying that model to the threshold COA question, the Court concluded that a COA should issue. *Id.*

On remand, in an opinion that literally incorporated *verbatim* (without attribution) analyses and discussions from

the dissenting opinion in this Court and from the State's brief on remand (which essentially repeated the State's unsuccessful brief in this Court), the Fifth Circuit denied relief on the merits of petitioner's *Batson* claim, concluding that petitioner "has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." App. 22a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT IGNORED THIS COURT'S EXPLICIT GUIDANCE REGARDING THE PROPER ANALYTICAL FRAMEWORK FOR EVALUATING THE MERITS OF PETITIONER'S *BATSON* CLAIM UNDER 28 U.S.C. § 2254.

The court of appeals was directed by this Court to determine whether petitioner was entitled to relief under 28 U.S.C. §§ 2254(d)(2) and (e)(1) based on his claim that the prosecution purposefully discriminated against African-Americans during his jury selection in violation of *Batson*. This Court provided specific guidance for how that analysis was to be conducted. The court of appeals paid lip service to that guidance but disregarded it in substance. As a result, it grievously misapplied the relevant standard and set a dangerous precedent.

The issue on remand focused exclusively on step three of the *Batson* inquiry. Although the state trial court had previously ruled that petitioner never established a *prima facie* case of discrimination, the State conceded before this Court that that ruling was clear error, and "there is no dispute" that petitioner has satisfied *Batson* step one. App. 35a. Because petitioner acknowledged that the State had proffered facially neutral reasons for its strikes, step two is satisfied as well. *Id.*

The remaining question, as this Court explained, is "step three: whether Miller-El 'has carried his burden of proving purposeful discrimination.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). Because the trial court's decision on the ultimate question of purposeful discrimination is a finding of fact, it will not be overturned on

direct review unless it is clearly erroneous. App. 36a-37a. Under 28 U.S.C. § 2254, state-court fact findings are given the same deference; where § 2254 applies, this Court's "habeas jurisprudence embodies" the deference accorded to a determination under *Batson* step three on direct review. App. 37a (under § 2254(e)(1), factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, and under § 2254(d)(2), a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding).

The proper evaluation of the evidence under *Batson* step three—as explicated by this Court in *Miller-El*—therefore mirrors the proper application of the fact-evaluation standards under § 2254. This Court emphasized that the deference due such findings of fact, whether on direct review or on federal habeas, does not "imply abandonment or abdication of judicial review." App. 37a. Indeed, if the standards under §§ 2254(d)(2) and (e)(1) have any meaning, they will by definition require relief in some cases. *Id.* This is such a case.

Accordingly, in laying out the analytical framework for the Fifth Circuit to apply on remand, this Court identified two categories of evidence that the Fifth Circuit was required to consider—and to consider in its totality—in evaluating petitioner's claim: the evidence of a pattern and practice of racial discrimination in jury selection in Dallas County, and the evidence that directly related to the conduct of the prosecutors in this case. App. 28a. The Court emphasized that "[i]t goes without saying" that a proper evaluation of a claim under *Batson* step three requires an evaluation and weighing of all of this relevant evidence, including "the facts and circumstances adduced in support of the *prima facie* case." *Id.* at 37a (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)).

Purportedly applying this standard on remand, the Fifth Circuit concluded that none of petitioner's evidence,

"either collectively or separately,"[1] indicated by clear and convincing evidence that the state trial court erred. App. 22a. The court of appeals failed, however, to do in substance what it professed to do in form. By refusing to give full consideration to the evidence adduced by petitioner in support of his *prima facie* case and by accepting without question the state court's credibility determinations, the court of appeals not only undermined this Court's authority but deprived *Batson* and § 2254 of meaning.

A. The Court Of Appeals Failed To Follow This Court's Direction To Consider Fully Evidence Of A Pattern And Practice Of Discrimination.

This Court held that historical evidence of racial discrimination by the District Attorney's office was clearly relevant to the ultimate question of purposeful discrimination in petitioner's jury selection, and it faulted the state courts for making "*no mention* . . . of the historical record of purposeful discrimination" in evaluating petitioner's claim. App. 44a (emphasis added). This failure heightened the concern that the state courts had erred because, even when presented with this evidence of a pattern and practice of discrimination, the trial court "somehow reasoned that there was not even the inference of discrimination to support a *prima facie* case"—a clear error that the State subsequently declined to defend. *Id.*

The Fifth Circuit on remand, however, never addressed or even acknowledged this failure by the state court. Nor

[1] While this "collectively or separately" phraseology (which states the correct standard, *see* pp. 14, 26-27 *infra*) appears in the penultimate paragraph of the court of appeals' opinion, it is the *only* indication that suggests that the court in fact engaged in the required holistic appraisal of the evidence. Throughout its opinion, the Fifth Circuit considers one category after another of petitioner's evidence, discusses that category in isolation, and concludes that *it* does not carry petitioner's burden. Nowhere in the opinion does the court explicitly perform, or appear to perform, the "collective" analysis verbalized in the penultimate paragraph of its opinion.

did it weigh the impact of that failure on the reasonableness of the state court's ultimate determination of a lack of purposeful discrimination. That failure directly contravenes this Court's guidance: This Court explicitly identified the state court's failure in this regard—and the state court's conceded commission of clear error on step one—as raising concern over the reasonableness of the state court's determination on step three.

In addition, notwithstanding this Court's admonition that "[i]t goes without saying" that evidence adduced to support petitioner's *prima facie* case should be weighed in making the ultimate determination under *Batson* step three, the Fifth Circuit discounted the relevance of the historical evidence "because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." App. 9a-10a. The notion that the stronger a *Batson* claimant's *prima facie* case at step one, the more cogent is the reason for ignoring that evidence at step three is completely unsound—as this Court, which took careful note of the fact that petitioner had "already met" step one, manifestly recognized in insisting nonetheless that the powerful historical evidence *had* to be considered in step three.

What is more, although in words the court of appeals seemingly acknowledged that historical evidence might undermine a prosecutor's race-neutral reasons, in practice it declined even to consider that evidence in this case because the state court, which was "in the best position to make a factual credibility determination, heard the historical evidence and determined that the prosecutors' race-neutral reasons for the peremptory strikes to be genuine." *Id.* The Fifth Circuit failed even to acknowledge what this Court took pains to point out: that the trial court conducted the *Batson* hearing more than *two years* after jury selection, significantly reducing any advantage in making credibility determinations, *id.* at 26a, and that these determinations were made by a trial judge who, even after a remand in which the Texas Court of Criminal Appeals had found that

petitioner had met his step-one burden, "somehow" explicitly concluded that he had *not* done so, (*id.* at 37a).

The court of appeals also ignored other evidence of the historical discrimination that this Court specifically directed it to weigh. First, this Court noted that petitioner's evidence indicated that African-Americans "almost categorically were excluded from jury service." App. 43a. This evidence, according to this Court, "reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection," and such bias is "of course relevant to the extent it casts doubt on the legitimacy of the State's motives in petitioner's case." *Id.* But the Fifth Circuit again refused to give this evidence any weight, because the court viewed it as relevant only to step one, and in any event had already concluded that the trial court's credibility determinations should be accepted. *Id.* at 9a-10a.

Finally, the Fifth Circuit failed altogether to mention petitioner's remaining historical evidence. Both prosecutors involved in petitioner's jury selection joined the District Attorney's Office when that office formally trained its prosecutors to exclude minorities from juries. App. 43a. As this Court indicated, that evidence leads to the "supposition that race was a factor" in petitioner's jury selection, and this supposition "could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." *Id.* This supposition is further reinforced, this Court held, by evidence that one of the prosecutors in this case had been found to have discriminated on the basis of race in another capital murder trial conducted while petitioner's state-court appeal was pending. *Id.* at 42a (citing *Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)).

Yet the Fifth Circuit made no mention of any of this evidence. Rather than weighing the credibility of the proffered race-neutral reasons against this backdrop of historical discrimination, as this Court directed, the Fifth Circuit did just the opposite: it accepted without question the state

court's credibility determinations—and then having done so, rejected any relevance of the historical evidence because it had already concluded that the prosecutors had legitimate motives to strike the jurors in question. This reasoning is flatly inconsistent with this Court's guidance, and it results in the improper application of *Batson* step three as well as of §§ 2254(d)(2) and (e)(1).

B. The Court Of Appeals Failed To Follow This Court's Direction To Weigh The Evidence That The Prosecutors Used Jury Shuffles To Manipulate The Racial Composition Of The Jury.

This Court also directed the Fifth Circuit to consider the evidence regarding "jury shuffles." App. 42a. The jury shuffle is a technique the Dallas County District Attorney's Office used—by its own admission—to "manipulate the racial composition of the jury." *Id.* Under Texas criminal procedure practice, parties are permitted to "rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled." *Id.* at 30a. The party requesting the procedure, with no information other than the appearance of the venire members, "literally shuffles the juror cards, and the venire members are then reseated in the new order." *Id.* Shuffling is a tool to manipulate the racial composition of the jury because jurors who are shuffled to the back of the panel are unlikely to serve, given that any prospective juror not questioned during *voir dire* is dismissed at the end of the week. *Id.* at 30a-31a.

This Court agreed with petitioner that the "prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." App. 42a. This suspicion "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." *Id.* And this Court faulted the state court for "apparently ignor[ing]"

evidence that the District Attorney's Office had admittedly used this technique for just such a racially discriminatory purpose. *Id.*

But the Fifth Circuit declined to consider the State's discriminatory use of jury shuffles, offering only the irrelevant observation that the defense had also requested shuffles. App. at 10a. The court failed to weigh the effect that this practice of "jury shuffling" had on the credibility of the prosecutors' assertions of non-discriminatory motive—a concern identified by this Court as important in conducting the *Batson* step-three analysis. *Id.* at 42a. And the court never even acknowledged the state court's apparent refusal to consider evidence regarding the past discriminatory use of this tactic by Dallas County prosecutors to exclude African-Americans from jury service—evidence that "amplified" this Court's concerns. *Id.* at 42a, 44a. Instead, the Fifth Circuit dismissed the evidence of the jury shuffles as "circumstantial evidence" that does not "overcome" the prosecutors' proffered race-neutral reasons for their strikes. *Id.* at 10a.

Of course, as this Court had already explained, the question is not whether each individual piece of evidence can itself "overcome" the proffered race-neutral reasons; the question is whether the cumulative weight of such evidence so erodes the credibility of the prosecution's assertion that race was not a factor that that assertion becomes "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991).

The "jury shuffle" provides a perfect opportunity to discriminate for those "who are of a mind to discriminate," *Batson*, 476 U.S. at 96, and the pattern and practice evidence adduced by petitioner demonstrates that the District Attorney's Office was "suffused" with such bias. Indeed, the shuffles show that the prosecution was attempting to exclude African-Americans from the jury before it knew anything about their views—when it had "no information about the prospective jurors other than their appearance." App. 30a. The shuffles thus undermine "the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection" (*id.* at 42a), and instead support the conclusion that the race-neutral reasons which the prosecution later cited—and which the panel unreservedly endorsed—were pretexts for discrimination.

C. The Court Of Appeals Failed To Follow This Court's Guidance To Consider The Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans From The Jury.

The record evidence at the post-trial *Batson* hearing showed that the prosecutors in petitioner's trial had questioned venire members differently based on race, with the intent to disqualify or otherwise remove African-Americans from the jury. *See* App. at 28a-30a, 40a. The state trial court, however, found that there was no disparate questioning, and the Fifth Circuit in denying petitioner's COA agreed, concluding that "[t]he findings of the state court that there was no disparate questioning of the *Batson* jurors . . . is fully supported by the record." *Id.* at 40a (quoting *Miller-El*, 261 F.3d at 452).

This Court rejected that conclusion. App. 40a. The Court found that the Fifth Circuit's interpretation of the evidence in this regard was "dismissive and strained," and that "disparate questioning *did* occur." *Id.* (emphasis added). This Court concluded that the disparate questioning concerned two topics: the venire members' views on the death penalty and on minimum sentencing. Yet on remand, the Fifth Circuit continued to treat dismissively the very evidence of racially disparate questioning addressed by this Court.

1. Views on the death penalty

The prosecutors asked all of the potential jurors about their views on the death penalty, but this inquiry was prefaced, in some cases, with a graphic description of an execution that was intended to elicit hesitancy about the death penalty. App. at 41a. This graphic description was used for 53% of African-Americans, but with only 6% of white venire

members. *Id.* The State argued before this Court that that statistical disparity was not based on race but was the result of a disproportionate number of African-American venire members having indicated doubts about the death penalty on their juror questionnaires. *Id.*

This Court rejected that explanation, finding that it "cannot be accepted without further inquiry" because "the State's own evidence is inconsistent with that explanation." App. 41a. As this Court explained, even by the State's own reckoning, 70% of the African-Americans who expressed hesitancy about the death penalty received the graphic script while only 20% of the potential white jurors who had expressed hesitancy received that script. *Id.*

Yet on remand the State offered the very same explanation—in fact submitting an almost identical brief. And the Fifth Circuit in turn, far from undertaking the "further inquiry" mandated by this Court, proceeded to reach the same conclusion that this Court had already rejected, stating that "the record . . . reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race." App. 18a. Further demonstrating its disregard for this Court's decision, the Fifth Circuit's analysis on this point consisted entirely of passages taken almost *verbatim* and without attribution from the *dissent* to this Court's opinion. *Compare id.* at 61a-63a (Thomas, J., dissenting) *with id.* at 19a-21a.

Unsurprisingly, therefore, the Fifth Circuit repeated its previous error of "accept[ing] without question the state court's evaluation of the demeanor and credibility of the prosecutors and jurors in petitioner's trial." App. 38a. Rather than examining whether there was evidence in the record to support the state court's conclusion that there was no disparate questioning, the Fifth Circuit simply accepted that conclusion, "presuming" that there must be additional evidence—not in the record—that supported the state court's conclusion. *Id.* at 19a-20a.

Specifically, of the 10 white venire members identified by the State as having expressed hesitancy about the death

penalty on their juror questionnaires, *only two* were given the graphic script, while of the 10 African-American venire members identified by the State as having similarly expressed hesitancy, *seven* received the graphic script. App. at 41a. Petitioner contended that there was therefore no force to the State's argument that the disparate questioning was based on the potential jurors' views about the death penalty, and there was no explanation for the statistical disparity other than race. Reply Brief for Petitioner 15, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002). The Fifth Circuit, however, concluded that because the State claimed that the disparate questioning was driven by the jurors' answers about the death penalty on their juror questionnaires, the eight white jurors who were not given the graphic script "presumably" had answered their questionnaires in a way that indicated they were firmly opposed to the death penalty, such that there was no reason to give them the graphic script to "find out" their views. App. 19a-20a.

The Fifth Circuit adopted this theory from the dissent to this Court's opinion in *Miller-El*, which likewise hypothesized that the prosecution used the graphic script only with jurors whose juror questionnaires indicated ambivalence about the death penalty. App. at 61a-62a (Thomas, J., dissenting). It imagined that jurors who expressed clear opposition to the death penalty escaped the graphic script because their views needed no clarification. *Id.* at 60a. This theory rests entirely on speculation, however, because the questionnaires of most of the white jurors—including many of those whose *voir dire* testimony the dissent cites—*were not part of the record*. *Id.* at 61a.[2] And most important, this theory was obviously rejected by the Justices who formed the majority of this Court in *Miller-El*.

Of course, §§ 2254(d)(2) and (e)(1) require an evaluation of the factual determinations actually made by the state

[2] Miller-El sought discovery of the remainder of the white jurors' questionnaires in federal district court, but was not granted access to this information.

court, and of its decisions based on factual determinations made "in light of the evidence presented in the state-court proceeding." Evidence outside that record—particularly evidence that is only "presumed" to exist—is not relevant. In any event, as this Court pointed out, if such evidence had existed, "it cannot be presumed that the State would have refrained from introducing it." App. 41a-42a (internal citations and quotation marks omitted).

2. Minimum sentencing

The prosecutors also questioned potential jurors differently about their willingness to impose the minimum sentence for murder. App. at 28a-29a. Under Texas law at the time of petitioner's trial, an unwillingness to impose the minimum sentence was cause for removal, *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub. nom. Huffman* v. *Beto*, 408 U.S. 936 (1972), and questioning in this regard is a strategy normally used by the defense to "weed out pro-state members of the venire" (App. 29a).

"[I]ronically," however, the prosecutors in petitioner's trial themselves employed this strategy (App. 29a), and in a starkly disparate way: 94% of the whites were informed of the statutory minimum before being asked whether they could impose that minimum, while only 12.4% of African-Americans were so informed of the statutory minimum (*id.* at 41a). The State proffered "[n]o explanation . . . for the statistical disparity." *Id.* Accordingly, this Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." *Id.* at 42a.

Yet with precisely the same record the Fifth Circuit on remand concluded the opposite: that "[t]he prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser-included defense of murder." App. 21a. The court of appeals explained that the prosecution used the different

questioning on the minimum sentence issue only "as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause." *Id.*; *see also id.* at 64a (Thomas, J., dissenting) (same).

Aside from the dubious logic of that assertion, it also contradicts a specific finding of this Court. That is, the Fifth Circuit asserted that the African-American venire members who were given the "allegedly manipulative minimum punishment script" were given that script because they were all opposed to the death penalty in varying degrees. *Id.* at 21a; *id.* at 64a (Thomas, J., dissenting) (same). But this Court had previously found that there were white venire members who "also expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but were not subjected to this manipulative questioning. *Id.* at 40a; *see also* Respondent's Brief 19 & n.44, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002). And in any event, putting aside whether the State's characterization of "ambivalence" is accurate with respect to the African-Americans who were given the graphic script, its position still leaves unexplained the State's failure to use its manipulative script with the vast majority of white venire members who expressed reservations about the death penalty. App. 41a; Reply Brief for Petitioner 17 n.23, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002).

Moreover, the Fifth Circuit never even acknowledged, much less accounted for, a fact this Court found highly significant: that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." App. 42a. By failing to consider all the evidence and the light it sheds on the motives and credibility of the prosecutors, the Fifth Circuit impermissibly deviated from this Court's guidance and from the requirements of § 2254.

D. The Court Of Appeals Improperly Accepted Without Question The State Court's Credibility Determinations And Failed To Follow This Court's Guidance Regarding Similarly Situated Venire Members.

This Court explained that the "critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." App. 35a. That question "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Id.* Whether those explanations were credible, and in turn whether the state court's determination in this regard was reasonable under § 2254, must of course be viewed in light of all the evidence. App. 37a; *Batson*, 476 U.S. at 93 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Hernandez*, 500 U.S. at 365; *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000).

Accordingly, this Court first noted that the prosecution in petitioner's trial had used its peremptory strikes to remove 91% of the eligible African-American venire members, while it had used such strikes against only 13% of the eligible non-black prospective jurors. App. 28a, 39a. This "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," according to the Court, because [h]appenstance is unlikely to produce this disparity." *Id.* at 39a.

The Court also pointed out that the trial court's traditional advantage in judging credibility, based on its contemporaneous observation of the jury selection process, was significantly reduced here because the *Batson* hearing was not held until more than two years after the jury was empaneled. App. 39a. As a result, this Court noted, "the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." *Id.* And the Court observed that ra-

cially disparate questioning of potential jurors will affect the evaluation of whether those jurors in fact have "divergent" views that could justify a peremptory strike and must be considered when evaluating pretext. Specifically, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." *Id.* at 40a-41a.

Once again, however, the Fifth Circuit on remand ignored this guidance. Its analysis of whether the prosecutors' race-neutral reasons were pretexts for discrimination, including whether there were similarly situated white jurors, makes no mention of (1) the two-year delay before the *Batson* hearing was held, (2) the gross racial statistical disparity in peremptory strikes, (3) the effect of disparate questioning on the characterization of the venire members views, or (4) any of the other evidence that this Court identified as relevant to the analysis. Instead, the court simply imported, frequently *verbatim*, many of the State's previously-rejected arguments attempting to distinguish the views of the challenged jurors. *Compare* App. 11a-18a *with* Brief of Appellee (on remand) 6-13, 16-18, *and* Brief of Respondent (before this Court) 3-8, 11-12.

But the Fifth Circuit's error here is more fundamental. That court made no attempt to evaluate whether the prosecutors' assertedly race-neutral reasons for striking African-American venire members might in reality have been based on racial considerations. Instead, the court stated that "once we have identified the reasons for the strikes, the credibility of the reasons is *self-evident*." App. 11a (emphasis added). But this Court remanded this case for the Fifth Circuit to evaluate the evidence supporting petitioner's claim, including the evidence that similarly situated white jurors were not struck, specifically because the credibility of the prosecutors' reasons was *not* "self-evident." *Id.* at 40a (whether prosecutors' reasons were pretexts for discrimination is debatable).

In reaching that conclusion, this Court found that "[i]n this case, three of the State's proffered race-neutral ration-

ales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." App. at 39a-40a (ambivalence about the death penalty, hesitancy to impose the death penalty on those who could be rehabilitated, and the jurors' own family history of criminality). The Fifth Circuit flatly ignored that finding and held, on precisely the same record, that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans." *Id.* at 11a.

The Fifth Circuit's ultimate conclusion that there was no purposeful discrimination in petitioner's jury selection, therefore, rested on two erroneous findings: that the credibility of the prosecutors' reasons for striking African-American venire members was "self-evident," and that there were no unchallenged non-black venire members situated similarly to the struck African-Americans. Both of these findings directly contravene this Court's opinion.

In any event, the evidence in the record also contradicts the court of appeals' characterization of the *voir dire*. Although space limitations preclude a full refutation of the State's and Fifth Circuit's characterization of the *voir dire*, some examples are illustrative. The Fifth Circuit's treatment of African-American venireperson Billy Fields is typical. The court of appeals credited the State's assertion that "[t]he prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony." App. at 12a. The record shows, however, that, if anything, Fields was more supportive of the death penalty than white jurors whom the State found qualified, and that his religious beliefs buttressed that support.

Fields expressed unambiguous support for the death penalty on his questionnaire, and then wrote "[i]f you commit the crime pay the pen[alt]y." *See* Reply Brief for Petitioner 2, *Miller-El* v. *Cockrell*, No. 01-7662 (U.S. 2002) (alteration in original). Although Fields believed that every-

one can be rehabilitated, he made it clear that he would vote for the death penalty *even* for someone who could be rehabilitated. JA 118-119. Fields' religious faith in fact led him to *strongly support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 108. Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108. It is difficult to imagine a more pro-State juror than one who views the State as "God's extended person."

In contrast, seated white juror Sandra Hearn expressly stated that her support for the death penalty *depended* on whether the defendant could be rehabilitated. JA 694 ("I believe in the death penalty *if* a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense." (emphasis added)).[3] If anything, it was the seated white juror's views on rehabilitation that were likely to have an impact on her willingness to impose the death penalty.

With the white juror, however, the Fifth Circuit looked beyond her comments about rehabilitation and explored her *voir dire* for other attributes that made her a strong State's juror. Hearn was a strong State's juror and petitioner's trial counsel tried to remove her, a fact that caused the panel to label petitioner's arguments as somehow "disingenuous." App. 15a. But Fields' *voir dire* indicated that he was also a strong State's juror; he was a conservative, deeply religious, middle-aged family man with deep roots in the community

[3] White juror Kevin Duke also expressed strong views about the virtues of rehabilitation. When questioned about a law that would permit a convicted murderer to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it .... I believe in forgiving." JA 587.

and strong, pro-death penalty views. JA 125-127. The Fifth Circuit's conclusion that he was struck because of his views on rehabilitation finds no support in the record.

According to the court of appeals, Fields was also properly struck because he had a family member with a criminal history. App. 12a. But when the prosecution asked Fields about the incarceration of his brother, Fields responded, "I don't really know too much about it." JA 124, 133-134. When asked whether his brother's trouble with the law "would in any way interfere with [his] service on this jury," Fields unhesitatingly said, "No." JA 124. The State's treatment of Fields contrasts sharply with that of Noad Vickery, a white venireperson who was accepted by the State and struck by the defense. Like Fields, Vickery was unsure of the details of his sibling's incarceration. But unlike Fields, Vickery hesitated when asked whether it would interfere with his service on the jury:

> Q: Would that affect your ability to serve as a juror in this case?
>
> A: I don't think so, no.
>
> Q: You keep on saying "I don't think so." When you say I don't think so, you're saying that's no?
>
> A: No, it would not, I'm sorry.

JA 435-436. If anything, Vickery's hesitations made him a less attractive juror, and if concern about a family member's criminal history motivated the prosecutors' strike of Fields, it should have similarly subjected Vickery to a prosecution strike.[4]

[4] The Fifth Circuit attempted to justify the prosecution's disparate treatment of potential jurors who had a family member with a criminal history with distinctions based on the particular circumstances of the relative's criminal episode. App. 17a. But such distinctions were not made by the prosecutors at the time, and cannot now be used to rationalize the prosecutors' motives. The prosecutors for the most part failed even to ask questions on the subject when potential jurors revealed a family member with a criminal history. For example, three African-American venire members were struck by the prosecution for the proffered reason that each had relative with a criminal history. However, four white jurors had a relative with a criminal history and were accepted by the State. Of these seven jurors, the State questioned only two (one white and one African-American, Fields) about this issue.

The Fifth Circuit faulted petitioner for "fail[ing] to identify any unchallenged non-black venire member similarly situated" to the *Batson* jurors because there were allegedly no white seated jurors who shared the same combination of characteristics as the African-American jurors who were excluded by the State. App. 18a. But this Court specifically found, on the same record, that "three of the State's proffered reasons for striking African-American jurors pertained just as well to some white jurors who were not challenged" and who served on the jury (App. 40a).

What is more, petitioner did identify such similarly situated jurors. For example, white venireperson Vickery expressed the precise combination of reasons the State used to justify striking Fields. In addition to having a relative with a criminal history, Vickery also expressed ambivalence about the death penalty and hesitancy about imposing it.[5] And even the concurring and dissenting Justices on this Court conceded that "petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza." App. 49a (Scalia, J., concurring); *see also* App. 58a-59a (Thomas, J., dissenting). Ambivalence about

[5] Inquiring into Vickery's feelings about the death penalty, the prosecution asked him whether, if he were governor for a day, he would keep or abolish the death penalty. Vickery responded: "I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again, as a human being, it's hard to say that you want to see someone die. I honestly can't tell you, you know, how I feel." App. 67a. Mr. Vickery was also asked whether he himself could apply the death penalty in a specific case, and again gave a far from resounding answer: "I think I can make a decision [if placed on a sentencing jury]. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I don't particularly want to make it, but I think I could." App. 67a-68a.

the death penalty was the sole reason proffered for striking Edwin Rand. In short, the prosecution accepted white jurors who were similarly situated to African-Americans that were peremptorily removed, and there is no credible explanation for their having done so other than race.

II. This Case Is Of Paramount Importance

In addition to directly contradicting several of this Court's specific conclusions, the Fifth Circuit's entire approach to the *Batson* step-three analysis, and by extension to the analysis under § 2254, is fundamentally flawed. Its denial of relief on the merits simply repeats the errors it committed in denying the COA, by failing to fully consider all the relevant evidence and by accepting "without question" the state court's credibility determinations.

The opinion below thereby not only undermines this Court's supervisory authority, but it also interprets this Court's precedents for applying *Batson* and § 2254 in a manner that deprives both of meaning. The evidence that white jurors who were not peremptorily struck were similarly situated to African-American venire members who were—along with the evidence of the history of discrimination in jury selection in Dallas County, the use of jury shuffles and disparate questioning to manipulate the racial composition of the jury, and the fact that one of the prosecutors in this case had previously committed a *Batson* violation—all shed light on the credibility of the prosecutors' proffered rationales and whether those rationales were pretexts for discrimination. Yet despite this Court's explicit guidance, the Fifth Circuit failed to consider this and other evidence, in substance if not in form. *See, e.g., Kyles* v. *Whitley*, 514 U.S. 419, 440-441 (1995) (despite Fifth Circuit's assurance that it had considered "all" evidence relevant to *Brady* materiality analysis, this Court finds that the Fifth Circuit actually "dismiss[ed] *particular* items of [*Brady*] evidence as immaterial," an approach which added up to a "series of *independent* materiality evaluations, rather than the cumulative evaluation" required by precedent) (emphasis added); *Banks* v. *Dretke*, 124 S. Ct. 1256, 1270, 1276 (2004) ("[T]he Fifth Circuit ... concluded ... [that] Farr's status as an informant was not 'materia[l]' for *Brady* purposes.... Our touchstone on materiality is *Kyles v. Whitley*, ... [which] instructed that the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict'" (emphasis added)); *Williams* v. *Taylor*, 529 U.S. 362, 397-398 (2000) (faulting state court for failing to consider "totality" of the evidence in evaluating prejudice caused by counsel ineffective assistance).

It is of paramount importance for this Court to take this case, therefore, both to affirm its supervisory authority over the lower courts and to vindicate the very purpose for its original grant of certiorari—to provide guidance to the lower courts as to the proper way to evaluate evidence under *Batson* such that its protections do not become a "vain and illusory" promise. Equally important, and closely related, is the need for this Court to provide guidance to the lower courts as to the proper evaluation of evidence under the standards of §§ 2254(d)(2) and (e)(1). This question pervades federal habeas practice. If the Fifth Circuit's decision—in which it accepted "without question" the state court's evaluation of the prosecutors' credibility—is allowed to stand, then the standards under § 2254 for reviewing state-court decisions based on factual determinations will be nullified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2253(c) of Title 28, United States Code, provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Sections 2254(d) and (e)(1) of Title 28, United States Code, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

APPENDIX B

United States Court of Appeals
Fifth Circuit

Thomas Joe MILLER-EL,
Petitioner-Appellant,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

No. 00-10784

Feb. 26, 2004

Appeal from the United States District Court
for the Northern District of Texas

[2004 WL 352542]

Before DAVIS, JONES and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

[1] Petitioner brings this federal habeas corpus petition claiming, pursuant to *Batson* v. *Kentucky*, that the state trial court erred in finding that there was no purposeful discrimination in the selection of his jury. The district court denied Petitioner relief. The district court then denied a certificate of appealability ("COA"). Petitioner previously appealed to this court and we denied a COA. The Supreme Court reversed. We then granted COA and now address the merits of Petitioner's appeal.

BACKGROUND

On November 16, 1985, Thomas Jo Miller-El, his wife, and Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. During the robbery two employees, Doug Walker and Donald Hall, were ordered to lie on the floor, gagged with strips of fabric, and their hands and feet were bound. Miller-El shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The state indicted Miller-El for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, Miller-El moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding blacks through the use of peremptory challenges. Miller-El's trial occurred before the Supreme Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, Miller-El sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding blacks from jury service. In a pretrial hearing held on March 12, 1986, Miller-El presented evidence in support of his motion. The trial judge, however, found "no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." The state court then denied Miller-El's motion to strike the jury. Twelve days later, the jury found Miller-El guilty; and the trial court sentenced him to death.

Miller-El appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Supreme Court issued its opinion in *Batson* v. *Kentucky* and established a three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. 476 U.S. at 96-98, 106 S.Ct. 1712. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court

must determine whether the defendant has shown purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712.

After acknowledging Miller-El had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El* v. *State*, 748 S.W.2d 459, 461 (Tex.Crim.App.1988)(en banc). A post-trial hearing was held on May 10, 1988. There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial.

[2] On January 13, 1989, the trial court concluded that Miller-El's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a *prima facie* case. Notwithstanding this conclusion, the state court determined that the state would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each black venire member excluded. The court further found "no disparate prosecutorial examination of any of the venire [members] in question" and "that the primary reasons for the exercise of the challenges against each of the venire [members] in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty."

The Texas Court of Criminal Appeals denied Miller-El's appeal, and the Supreme Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Miller-El's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

Miller-El filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254.[1] The federal magistrate judge who considered the merits of the *Batson* claim recommended, in deference to the state court's acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that Miller-El be denied relief. The United States district court adopted the recommendation. Pursuant to 28 U.S.C. § 2253, Miller-El sought a COA from the district court, and the application was denied. Miller-El renewed his request to this Court, and we also denied a COA. Miller-El appealed to the Supreme Court and certiorari was granted. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002). In an opinion issued on February 25, 2003, the Supreme Court concluded based on a "threshold examination" of the record, that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and thus we had erred in not granting COA on Miller-El's *Batson* claim. *Miller-El* v. *Cockrell*, 537 U.S. 322, 347-48, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Supreme Court remanded the case to this Court to determine whether Miller-El can "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Id.* at 348, 123 S.Ct. 1029. We granted COA for precisely that determination. *Miller-El* v. *Johnson*, 330 F.3d 690 (5th Cir.2003)(per curiam).

[1] Although Miller-El raised four issues, the petition has been narrowed down by the Supreme Court to only the jury selection claim premised on Batson. *See Miller-El* v. *Cockrell*, 537 U.S. 322, 329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

DISCUSSION

[3] Claims of racial discrimination in jury selection are evaluated according to the framework established in *Batson* v. *Kentucky*, which requires a three-step analysis that shifts the burden of production between the parties. 476 U.S. at 96-98, 106 S.Ct. 1712. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if the requisite showing has been made, the burden shifts to the prosecution to provide a race- neutral explanation for striking the venire member in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, the defendant again has the burden, this time of proving purposeful discrimination.

Id. at 98, 106 S.Ct. 1712. Under *Batson*, the ultimate burden of persuading the court that the state's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. *Id.* at 94 n. 18, 106 S.Ct. 1712 (citing *Tex. Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)); *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

In the present case, there is no dispute that Miller-El presented a *prima facie* claim under *Batson*'s first step. Nor is there any dispute that the prosecution presented facially race-neutral reasons for exercising each peremptory challenge. The only issue is Miller-El's disagreement with the trial court's determination at *Batson*'s third step that Miller-El had failed to show that the prosecution's reasons for exercising the challenged peremptory strikes were not credible and Miller-El had not demonstrated that purposeful discrimination had occurred. The federal district court has already determined on habeas review that Miller-El has failed to show that the state court erred, and therefore is not entitled to habeas relief. Miller-El is now appealing this determination and COA has been granted. Therefore we now address the merits of Miller-El's appeal.

Under the current scheme for habeas review in federal court, which was substantially updated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(e)(1) requires that we "presum[e]" the state court's findings of fact "to be correct" unless Miller-El can rebut the presumption "by clear and convincing evidence."[2] As the Supreme Court has stated, the state court's finding at step three of Miller-El's *Batson* claim was a finding of fact

[2] The language of § 2254(e)(1) could not be clearer:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

and therefore subject to § 2254(e)(1)'s presumption of correctness. Miller-El, 537 U.S. at 339, 123 S.Ct. 1029 (citing *Hernandez* v. *New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), for the proposition that the determination made at step three of *Batson* is a " 'pure issue of fact' accorded significant deference").

We follow the lead of the Supreme Court in utilizing their decisions in *Hernandez* v. *New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett* v. *Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), to guide our decision regarding the trial court's finding of no purposeful discrimination at step three in this *Batson* claim. These Supreme Court opinions state that the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness and credibility of the prosecutor's justification for his peremptory strike. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *Hernandez*, 500 U.S. at 364-65, 111 S.Ct. 1859. Further, these cases, applying a standard of review even less deferential to the trial court's finding than we are required to apply under AEDPA, articulate that deference is necessary because the reviewing court is not as well positioned as the trial court to make credibility determinations, and once the trial court has made a credibility determination concerning the prosecutor's state of mind regarding the peremptory strikes, the step three determination under *Batson* has been decided. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769 (citing 28 U.S.C. § 2254(d)(8) and stating that the standard of review for a federal habeas claim required that the factual findings of the state court be presumed to be correct, and "may be set aside, absent procedural error, only if they are 'not fairly supported by the record' "); *Hernandez*, 500 U.S. at 366-67, 111 S.Ct. 1859 (applying, on direct review of a state court's factual findings, a "clearly erroneous" standard).

[4] Miller-El argues that the state court's finding of the absence of purposeful discrimination was incorrect and the corresponding factual determinations were "objectively unreasonable" in light of the following four areas of evidence

that he claims were before the court. First, evidence of historical discrimination by the Dallas County District Attorney's office in the selection of juries. Second, the use of the "jury shuffle" tactic by the prosecution. Third, the alleged similarity between non-black venire members who were not struck by the prosecution and six blacks who were. Fourth, evidence of so-called disparate questioning with respect to venire members' views on the death penalty and their ability to impose the minimum punishment.

First, Miller-El argues that he presented evidence of the Dallas County District Attorney's office "unofficial policy" of excluding blacks from jury service. Some of this evidence was first presented in the *Swain* hearing conducted by the trial court. When Miller-El's counsel attempted to reintroduce this historical evidence at the post-trial *Batson* hearing, the prosecution objected, arguing that even if accurate the evidence was irrelevant under *Batson*. The court admitted the evidence but reserved the right to give it no weight.

As the United States magistrate judge found, there was considerable evidence that the Dallas County District Attorney's office had an unofficial policy of excluding blacks from jury service and that this evidence was disturbing. The district court accepted this finding. But both the magistrate and district court noted that the historical evidence, however disturbing, is not determinative of whether there was purposeful discrimination in the selection of Miller-El's jury. We also note that the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable. The Supreme Court stated that proof "that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection" is "relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions" in Miller-El's case. *Miller-El*, 537 U.S. at 347, 123 S.Ct. 1029. In this case, however, the relevancy of this evidence is less significant because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case. This historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however, as explained below the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect.

[5] Second, Miller-El argues that the state court erred in not finding purposeful discrimination based on the use of the "jury shuffle" tactic by the prosecution. The record, however, clearly establishes that Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice. Again, Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the *voir dire* process including the jury shuffles.

Third, Miller-El argues that there were similarities between non-black venire members who were not struck by the prosecution and six blacks who were. Miller-El maintains that the following six black venire members were victims of racially motivated peremptory strikes: Roderick Bozeman, Billy Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy.

As to each of the black venire members Miller-El claims were the victims of racially motivated peremptory strikes, it is important to identify the prosecution's stated reasons for

exercising a peremptory challenge. Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident. Further, we can determine from the record that there were no unchallenged non-black venire members similarly situated, such that their treatment by the prosecution would indicate the reasons for striking the black members were not genuine. [3]

[6] Roderick Bozeman stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person." If Bozeman thought there was a chance of rehabilitation, he did not think the death penalty was appropriate. He said that a "mentally disturbed" person and "a Manson type" were examples of someone who could not be rehabilitated. He said, however, that repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. Bozeman classified himself as the type of person who believed in the death penalty in principle, but who could not actually serve on a capital jury. He verified his inability to impose the death penalty by stating that even if the evidence compelled "yes" answers to the special issues posed to the jury at the punishment stage, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. The prosecution exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his belief that a pattern of violent conduct would not be sufficient to render a defendant deserving of death, and his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence.

Venire member Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury.

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[3] With the exception of black venire members Joe Warren and Paul Bailey, the prosecution set forth its race-neutral reasons for exercising the peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing the court took judicial notice of that prior testimony in the *voir dire* record. Miller-El has not based his claim on the prosecution striking Bailey.

However, after being informed that the possibility of rehabilitation would be a factor he would need to consider in assessing whether to impose the death penalty, Fields proclaimed that his religious belief was that no one was beyond rehabilitation. Fields stated, "I f[illegible]ike, if a person has the opportunity to really be talked [t[illegible] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." He further stated, "when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." Additionally, Fields indicated in his questionnaire and in response to questions by the prosecution that his brother had been incarcerated numerous times for drug offenses. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony.

Venire member Joe Warren answered questions during *voir dire* in a noncommital manner and indicated ambivalence about the death penalty and his ability to impose it. He stated, "there are some cases where I would agree [with the death penalty], you know, and there are others that I don't." When the prosecution described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, he responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." When asked whether he could make a decision between a life sentence and a death sentence, Warren answered, "I think I could." When questioned about his ability to answer the future dangerousness special issue question, Warren responded, "I suppose there's always a chance, but there again, you never know." Finally,

Warren stated, "Well, it[']s just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice." The prosecution exercised a peremptory challenge to remove Warren. Miller-El's counsel did not object to the peremptory strike against Warren contemporaneous to the strike, therefore the prosecution did not give its race-neutral reasons at *voir dire*. At the *Batson* hearing, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during *voir dire* as the reasons for striking him. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the state had ten challenges remaining before exercising one to remove Warren. The prosecutor noted at the *Batson* hearing that an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses and peremptory challenges either remain unused or get used more rapidly. In fact, the prosecutor on cross-examination at the *Batson* hearing admitted that he would have struck non-black jurors Sandra Hearn and Fernando Gutierrez, who also gave somewhat ambivalent answers regarding the death penalty, before Warren, had they come up earlier in the process.

[7] Venire member Edwin Rand described capital punishment as a "touchy subject" during *voir dire* but did indicate on his questionnaire that he believed in the death penalty. In response to several alternative choices put to him by the prosecution, Rand described himself as a person who may or may not be able to impose the death penalty. He said, "Somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." The prosecution exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his lack of ability to serve on a capital jury.

Venire member Carrol Boggess indicated on her questionnaire that she had a moral, religious, or personal belief that would prevent her from imposing the death penalty.

During *voir dire* she stated, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." Later she stated, "I'm not saying that I feel like I could impose the sentence myself--or I'm not going to be imposing the sentence, is that correct?" When directly asked whether she could vote for a death sentence, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure." She continued by stating "whether or not I could actually go through with murder--with killing another person or taking another person's life, I just don't know. I'd have trouble with that." Boggess also indicated that she had testified as a defense witness at her nephew's theft trial. The prosecution exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's trial.

[8] Venire member Wayman Kennedy stated on his questionnaire he believed in the death penalty "only in extreme cases." On *voir dire* he stated that he believed in the death penalty only for mass murders or cases involving mutilation. Kennedy stated he did not think a murder in the course of a robbery would necessitate the death penalty because "why wouldn't a life sentence be enough." Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could." The prosecution exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery, the crime Miller-El was accused of, his view that the death penalty was only appropriate in extreme cases, and his hesitancy in stating that he could answer the special issues according to the evidence.

Miller-El claims that three non-black venire members, Sandra Hearn, Marie Mazza, and Ronald Salsini, expressed views about the death penalty as ambivalent as those expressed by Bozeman, Fields, Warren, Rand, Boggess, and Kennedy, but the three non-black venire members were not struck by the prosecution. The record, especially the *voir dire* transcript, does not support this assertion.

Sandra Hearn stated in her jury questionnaire and on *voir dire* that she believed in the death penalty and could assess it in appropriate cases. She did express the belief that someone should not be sentenced to death on a first offense but if the person had committed any prior offense including robbery or some other criminal act of violence the death penalty would be appropriate. The evidence admitted at the punishment phase of Miller-El's trial indicated he had committed two previous armed robberies and one also involved a kidnaping. Hearn also stated she thought the death penalty should be available for more than just murder but also severe torture and extreme child abuse. She indicated that she had respect for law officers, that her father was a retired FBI agent, and that she had daily contact with police officers in her employment. Miller-El's counsel must have believed Hearn was a pro-prosecution venire member because he attempted to have her challenged for cause on numerous grounds, and when the trial judge found Hearn qualified, Miller-El's counsel requested an additional peremptory strike in order to remove her. In fact, on direct appeal Miller-El continued to argue that the trial court erred in denying his challenge for cause of Hearn, so it seems disingenuous to argue now that she was similarly situated to the black jurors who expressed reservations about imposing the death penalty.

Venire member Maria Mazza indicated on her juror questionnaire that she believed in the death penalty. When asked about her feelings on the death penalty at *voir dire*, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony.... It's kind of hard determining somebody's life, whether they live or die, but I feel that is

something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." Mazza served on Miller-El's jury.

[9] Venire member Ronald Salsini stated he believed in the death penalty and that he could impose the death penalty. He did indicate imposing the death penalty would be difficult; however, he gave a hypothetical crime based on his personal experience as a bank teller that closely paralleled the crime Miller-El was charged with and stated that such a criminal act was deserving of the death penalty. The prosecution did not strike Salsini but Miller-El's counsel did.

Comparing the views expressed by Hearn, Mazza, and Salsini to the views expressed by the challenged black venire members, it is clear that Hearn, Mazza, and Salsini were not similarly situated for several reasons. First, ambivalence about the death penalty was not the sole reason for striking Bozeman, Fields, or Boggess. Second, Warren, Rand, and Kennedy were struck mainly because of ambivalence about the death penalty, but they each also expressed doubts about whether they personally could impose the death penalty even if the evidence indicated the death penalty was appropriate. This was not the case with Hearn, Mazza, and Salsini. Third, Warren refused to give a clear answer as to whether or not he could impose the death penalty if the evidence warranted it. Fourth, Kennedy stated the death penalty should be limited to extreme cases. Finally, Rand's ambivalence was less pronounced and more in line with the uncertainty expressed by Hearn and Mazza, although Rand still indicated he was uncertain as to whether he could impose the death penalty. Under our federal habeas standard of review, however, Miller-El has not shown by clear and convincing evidence that the trial court, who observed the *voir dire* process, erred in finding the prosecution's reason for striking Rand or the other black venire members credible.

Next, Miller-El claims non-black unchallenged venire members Hearn and Kevin Duke expressed views on rehabilitation similar to the views expressed by the black chal-

lenged venire members. Hearn's views have already been discussed. Duke expressed support for the death penalty and said he could impose it. Duke made comments concerning rehabilitation in the context of the availability of parole, not in the context of whether the death penalty was appropriate. Duke served on Miller-El's jury.

Again, the record does not support Miller-El's assertion. While the prosecution only cited views concerning rehabilitation as grounds for striking Bozeman and Fields, that was not the sole basis for exercising those strikes. As previously noted, Bozeman's and Fields' views on rehabilitation were much stronger than Hearn's and Duke's. Hearn and Duke were not similarly situated to any challenged black venire members.

Finally, Miller-El asserts that non-black venire members Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner were similarly situated to challenged black venire members who had family members with a criminal background. When Vickery was fifteen his sister had been arrested and served time in California. Vickery was a strong state juror and after unsuccessfully attempting to have him struck for cause, Miller-El used one of his preliminary strikes to remove Vickery. Davis' husband had been convicted of theft ten years earlier. Davis was a strong state juror and Miller-El attempted to have her struck for cause but was unsuccessful. Therefore, Miller-El used one of his preliminary strikes to remove her. Nix's brother entered a guilty plea in a high profile white-collar crime case. Nix, who served as an office manager for her brother's construction company, had been named in several civil suits relating to the white-collar crime issues. Nix was a strong prosecution juror and Miller used one of his preliminary strikes to remove her from the panel. Weiner's ten-year- old son had once been arrested for shoplifting. Weiner served on Miller-El's jury.

[10] Again, the record does not support Miller-El's *Batson* claim. The prosecution only cited a family member with criminal history as grounds for striking Boggess and Fields.

Furthermore, that was not the sole basis for striking either Boggess or Fields. In summary, Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members on whom he is basing his *Batson* claim. Therefore, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its preliminary challenges credible.

Fourth, Miller-El also argues that the prosecution posed different questions concerning the death penalty and the minimum allowable punishment to the venire members depending on the race of the venire member. The record, however, reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race. The prosecution used questioning to either ferret out a venire member's views on the death penalty or to establish a basis to disqualify venire members who had unfavorable views but were not subject to disqualification on those grounds.

One hundred and eight venire members survived the initial round of hardship excuses. The court excused three members for cause prior to *voir dire* and the parties agreed to remove thirty-nine others, including five blacks. Thus, a total of sixty-six venire members were subject to full *voir dire*, including fifty-one non-blacks and fifteen blacks.

The prosecution questioned all venire members concerning their views of the death penalty. A majority of the venire members were informed the state was seeking the death penalty and that affirmative answers to three questions submitted to the jury at the punishment phase would result in Miller-El being sentenced to death, and then asked about their views concerning the death penalty. Prosecutors did utilize a "graphic script" to describe an execution in detail to some venire members. Both black and non-black venire members who had expressed reservations never received the script. However, all black venire members given the graphic script had expressed some level of reservations about the death penalty in their juror questionnaires including Boggess, Kennedy, Bailey, Linda

ing Boggess, Kennedy, Bailey, Linda Baker, Troy Woods,[4] Janice Mackey, Anna Keaton, and Jeanette Butler.[5] Some of the non-black venire members questioned with the graphic script expressed reservations including Dominick Desinise and Clara Evans. Non-black venire member Vivian Sztybel did not express reservations about the death penalty yet still received the graphic script. Sztybel was ultimately seated on Miller-El's jury.

Miller-El contends that there were ten black venire members who expressed reservations and seven of these venire members, who were ultimately peremptory challenged by the prosecution, got the script, while there were ten non-black venire members who expressed reservations but only two got the script. Miller-El argues this disparity proves purposeful discrimination and therefore the trial court erred. A review of precisely what the prosecution did in terms of *voir dire* questioning indicates the trial court, who observed the *voir dire* process, did not err in finding there was no purposeful discrimination.

[11] The jury questionnaire asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?" Venire members could circle "yes" or "no," and then they were asked to "[p]lease explain your answer." Question 58 allowed venire members to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?"

Presumably, the eight non-blacks who did not receive the graphic script, but Miller-El thinks should have, answered "no" to question 56 and answered to "yes" to question 58. Questioning on *voir dire* also indicates there was no uncertainty as to the views of these eight non-black venire members. They were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts; in fact, a detailed description may have simply antagonized them and turned them off to the prosecutors. In fact, of these eight, five were removed for cause because of their views on the death penalty, including John Nelson, Linda Berk, Gene Hinson, Sheila White, and Joyce Willard while one, Leta Girard, was removed by agreement of the parties. The two others also had strong views, making use of the graphic script unnecessary. Margaret Gibson did not believe in the death penalty and the state exercised a peremptory challenge to remove her. James Holtz believed the death penalty was appropriate only if a police officer or fireman was murdered and the state exercised a peremptory challenge to remove him.

[4] Woods' questionnaire did not clearly indicate his views on the death penalty and thus he received the graphic script, but on *voir dire* he indicated that he fully supported the death penalty, the state believed him to be an excellent juror and he was in fact seated on Miller-El's jury.

[5] Jeanette Butler's juror questionnaire is not contained in the record, however, at *voir dire* she stated that she was unwilling to impose the death penalty. Butler was ultimately removed for cause.

The prosecution treated the black venire members no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence. This included Bozeman, Fields, Warren, and Rand. The black venire members who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing a combination of uncertainty and philosophical opposition to the death penalty. Those venire members included Boggess, Kennedy, Baker, Woods, Mackey, Bailey, and Keaton.

In summary, sixteen venire members for whom questionnaire information is available, clearly indicated on the questionnaires their feelings on the death penalty, and fifteen of them did not receive the graphic script. The one who did receive the script was non-black venire member Sztybel. Eight venire members gave unclear answers and those eight venire members received the graphic script. The answers given, not race, accurately indicated whether a venire mem-

ber got the graphic script, and this is confirmation of the prosecution's race-neutral rationale.

[12] The prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser- included offense of murder. Different questioning on the minimum sentence issue was used as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ what Miller-El argues is a "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic death penalty questioning.

Seven black venire members were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. These individuals included Rand, Kennedy, Bozeman, Warren, Baker, Boggess, and Fields.

According to Miller-El's argument the prosecution should have used the "manipulative" punishment script on Woods. But Woods gave answers indicating he would be an excellent state's juror and therefore the prosecution had no reason to attempt to have him removed. Had the prosecution sought to eliminate blacks because of race, the use of the "manipulative" script would have been deployed against Woods. But it was not, because the prosecution wanted Woods on the jury.

Likewise, there are no similarly situated non-black venire members who, under the prosecution's rationale, would have been questioned about minimum sentencing. This is true because unless a venire member indicated he would be a poor state's juror and would not otherwise be struck for cause or by agreement, there was no reason to use the "manipulative" script. Thus, of the ten non- black venire members who expressed opposition to the death penalty, eight were struck for cause or by agreement, meaning no "manipulative" script was necessary to get them removed.

Those struck included Desinise, Evans, Nelson, Berk, Hinson, White, Willard, and Girard. The other two non-black venire members Gibson and Holtz were both given the "manipulative" script and peremptorily struck.

In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred. Therefore, the district court correctly denied Miller-El habeas relief.

CONCLUSION

Having carefully reviewed the record in this case, the parties' respective briefing and arguments, and for the reasons set forth above, we affirm the decision of the district court in its denial of habeas relief to Miller-El because he has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination.

[13] AFFIRMED.

APPENDIX C

Supreme Court of the United States

Thomas Joe MILLER-EL,
Petitioner,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division

No. 01-7662

Argued Oct. 16, 2002
Decided Feb. 25, 2003

[537 U.S. 322]

Justice KENNEDY delivered the opinion of the Court.

In this case we once again examine when a state prisoner can appeal the denial or dismissal of his petition for writ of habeas corpus. In 1986 two Dallas County assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury which tried petitioner Thomas Joe Miller-El. During the ensuing 17 years, petitioner has been unsuccessful in establishing, in either state or federal court, that his conviction and death sentence must be vacated because the jury selection procedures violated the Equal Protection Clause and our holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The claim now arises in a federal petition for writ of habeas corpus. The procedures and standards applicable in the case are controlled by the habeas corpus statute codified at Title 28, chapter 153, of the United States Code, most recently amended in a substantial manner by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions.

The United States District Court for the Northern District of Texas, after reviewing the evidence before the state trial court, determined that petitioner failed to establish a constitutional violation warranting habeas relief. The Court of Appeals for the Fifth Circuit, concluding there was insufficient merit to the case, denied a certificate of appealability **[327]** (COA) from the District Court's determination. The COA denial is the subject of our decision.

At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, *supra*, at 484, 120 S.Ct. 1595. Applying these principles to petitioner's application, we conclude a COA should have issued.

I

A

Petitioner his wife Dorothy Miller-El, and one Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. They emptied the cash drawers and ordered two employees, Doug Walker and Donald Hall, to lie on the floor. Walker and Hall

were gagged with strips of fabric, and their hands and feet were bound. Petitioner asked Flowers if he was going to kill Walker and Hall. When Flowers hesitated or refused, **[328]** petitioner shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The State indicted petitioner for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, petitioner moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Petitioner's trial occurred before our decision in *Batson*, *supra*, and *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, petitioner sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing held on March 12, 1986, petitioner presented extensive evidence in support of his motion. The trial judge, however, found "no evidence ... that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." App. 813. The state court then denied petitioner's motion to strike the jury. *Ibid.* Twelve days later, the jury found petitioner guilty; and the trial court sentenced him to death.

Petitioner appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Court decided *Batson v. Kentucky* and established its three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. 476 U.S., at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions,

the trial court must determine **[329]** whether the defendant has shown purposeful discrimination. *Id.*, at 98, 106 S.Ct. 1712.

After acknowledging petitioner had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El v. State*, 748 S.W.2d 459 (1988). A post-trial hearing was held on May 10, 1988 (a little over two years after petitioner's jury had been empaneled). There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial. App. 843-844.

On January 13, 1989, the trial court concluded that petitioner's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a prima facie case. App. 876. Notwithstanding this conclusion, the state court determined that the State would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each African-American excluded. The court further found "no disparate prosecutorial examination of any of the veniremen in question" and "that the primary reasons for the exercise of the challenges against each of the veniremen in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty." *Id.*, at 878. There was no discussion of petitioner's other evidence.

The Texas Court of Criminal Appeals denied petitioner's appeal, and we denied certiorari. *Miller-El v. Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Petitioner's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

Petitioner filed a petition for writ of habeas corpus in Federal District Court pursuant to 28 U.S.C. § 2254. Although petitioner raised four issues, we concern ourselves here with only petitioner's jury selection claim premised on *Batson*. The Federal Magistrate Judge who considered the merits **[330]** was troubled by some of the evidence adduced

in the state-court proceedings. He, nevertheless, recommended, in deference to the state courts' acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that petitioner be denied relief. The United States District Court adopted the recommendation. Pursuant to § 2253, petitioner sought a COA from the District Court, and the application was denied. Petitioner renewed his request to the Court of Appeals for the Fifth Circuit, and it also denied the COA.

The Court of Appeals noted that, under controlling habeas principles, a COA will issue "'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Miller-El v. Johnson*, 261 F.3d 445, 449 (2001) (quoting 28 U.S.C. § 2253(c)(2)). Citing our decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the court reasoned that "[a] petitioner makes a 'substantial showing' when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." 261 F.3d, at 449. The Court of Appeals also interjected the requirements of 28 U.S.C. § 2254 into the COA determination: "As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1)." 261 F.3d, at 451.

Applying this framework to petitioner's COA application, the Court of Appeals concluded "that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary." *Id.*, at 452. As a consequence, the court "determined that the state court's adjudication neither resulted in a decision that **[331]** was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court," *ibid.*; and it

denied petitioner's request for a COA. We granted certiorari. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002).

B

While a COA ruling is not the occasion for a ruling on the merit of petitioner's claim, our determination to reverse the Court of Appeals counsels us to explain in some detail the extensive evidence concerning the jury selection procedures. Petitioner's evidence falls into two broad categories. First, he presented to the state trial court, at a pretrial *Swain* hearing, evidence relating to a pattern and practice of race discrimination in the *voir dire*. Second, two years later, he presented, to the same state court, evidence that directly related to the conduct of the prosecutors in his case. We discuss the latter first.

A comparative analysis of the venire members demonstrates that African- Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

These numbers, while relevant, are not petitioner's whole case. During voir dire, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential **[332]** juror for cause or by peremptory challenge. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. To the extent a divergence in responses can be at-

tributed to the racially disparate mode of examination, it is relevant to our inquiry.

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

> "[I]f those three [sentencing] questions are answered yes, at some point [,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death .. as the result of the verdict in this case if those three questions are answered yes." App. 215.

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us ... your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?" *Id.*, at 506.

There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. **[333]** *Huffman v. State*, 450 S.W. 2d 858, 861 (Tex.Crim.App. 1970), vacated in part, 408 U.S. 936, 92 S.Ct. 2860, 33 L.Ed.2d 753 (1972). This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of

36(94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" App. 509. In contrast, only one out of eight (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. The typical questioning of the other seven black jurors was as follows:

> "[Prosecutor]: Now, the maximum sentence for [murder] ... is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?
>
> "[Juror]: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> .....
>
> "[Prosecutor]: Again, we're not talking about self-defense or accident or insanity [1038] or killing in the heat of passion or anything like that. We're talking about the knowing--
>
> "[Juror]: I know you said the minimum. The minimum amount that I would say would be at least twenty years." *Id.*, at 226-227.

Furthermore, petitioner points to the prosecution's use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled. With no information about **[334]** the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Tex.Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp.2003). Shuffling affects jury composition because any prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of ju-

rors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported inadequacy of the card shuffle by a defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward.

Next, we turn to the pattern and practice evidence adduced at petitioner's pretrial *Swain* hearing. Petitioner subpoenaed a number of current and former Dallas County assistant district attorneys, judges, and others who had observed firsthand the prosecution's conduct during jury selection over a number of years. Although most of the witnesses denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the **[335]** District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

Some testimony casts doubt on the State's claim that these practices had been discontinued before petitioner's trial. For example, a judge testified that, in 1985, he had to exclude a prosecutor from trying cases in his courtroom for race-based discrimination in jury selection. Other testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire. *Id.*, at 788. Concerns over the exclusion of African-Americans by the District Attorney's Office were echoed by Dallas County's Chief Public Defender.

This evidence had been presented by petitioner, in support of his *Batson* claim, to the state and federal courts that denied him relief. It is against this background that we examine whether petitioner's case should be heard by the Court of Appeals.

II

A

As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and **[336]** obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ..." § 2253(c)(1). As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. "The COA statute establishes procedural

rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S., at 482, 120 S.Ct. 1595; *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). As the Court of Appeals observed in this case, § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack*, *supra*, at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484, 120 S.Ct. 1595 (quoting Barefoot, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based **[337]** on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances

where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot*, *supra*, at 893, n. 4, 103 S.Ct. 3383.

Our holding should not be misconstrued as directing that a COA always must issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners. *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("'AEDPA's purpose [is] to further the principles of comity, finality, and federalism'" (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000))); *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion of O'CONNOR, J.). The concept of a threshold, or gateway, test was not the innovation of AEDPA. Congress established a threshold prerequisite to appealability in 1908, in large part because it was "concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process ...." *Barefoot*, *supra*, at 892, n. 3, 103 S.Ct. 3383. By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course.

[338] A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot*, *supra*, at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §

2253 (c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

B

Since Miller-El's claim rests on a *Batson* violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson* and reaffirmed in our later precedents. *E.g.*, *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Contrary to the state trial court's ruling on remand, the State now concedes that petitioner, Miller-El, satisfied step one: "[T]here is no dispute that Miller-El presented a prima facie claim" that prosecutors used their peremptory challenges to exclude venire members on the basis of race. Brief for Respondent 32. Petitioner, for his part, acknowledges that the State proceeded through step two by proffering facially race-neutral explanations for these strikes. Under *Batson*, then, the question remaining is step three: whether Miller-El "has carried his burden of proving purposeful discrimination." *Hernandez*, *supra*, at 359, 111 S.Ct. 1859.

As we confirmed in *Purkett v. Elem*, 514 U.S., at 768, 115 S.Ct. 1769, the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness **[339]** of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Ibid.* In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

In *Hernandez v. New York*, a plurality of the Court concluded that a state court's finding of the absence of discriminatory intent is "a pure issue of fact" accorded significant deference:

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21, 106 S.Ct. 1712. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)." 500 U.S., at 365, 111 S.Ct. 1859.

Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. "[I]f an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the **[340]** appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Id.*, at 367, 111 S.Ct. 1859.

In the context of direct review, therefore, we have noted that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be

overturned unless clearly erroneous. *Id.*, at 364, 111 S.Ct. 1859. A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2); see also *Williams*, 529 U.S., at 399, 120 S.Ct. 1495 (opinion of O'CONNOR, J.).

Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. In the context of the threshold examination in this *Batson* claim the issuance of a COA can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (in action under Title VII of the Civil Rights Act of 1964, employee's prima facie case and evidence that employer's **[341]** race-neutral response was a pretext can support a finding of purposeful discrimination). Only after a COA is granted will a reviewing court determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary. At this stage, however, we only ask whether the District Court's application of AEDPA deference, as stated in § § 2254(d)(2) and (e)(1), to petitioner's Batson claim was debatable amongst jurists of reason.

tioner's Batson claim was debatable amongst jurists of reason.

C

Applying these rules to Miller-El's application, we have no difficulty concluding that a COA should have issued. We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.

This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable **[342]** requirement and applies to the granting of habeas relief rather than to the granting of a COA.

The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court

need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. Slack, 529 U.S., at 481, 120 S.Ct. 1595; *Hohn*, 524 U.S., at 241, 118 S.Ct. 1969. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

The case for debatability is not weakened when we examine the State's defense of the disparate treatment. The Court of Appeals held that "[t]he presumption of correctness is especially strong, where, as here, the trial court and state habeas court are one and the same." 261 F.3d, at 449. As we have noted, the trial court held its *Batson* hearing two years after the *voir dire*. While the prosecutors had proffered contemporaneous race-neutral justifications for many **[343]** of their peremptory strikes, the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it. As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecutors explained

that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal of the prosecution's explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African- American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be "difficult" to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated; and four white jurors had family members with criminal histories. As a consequence, even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred.

[344] We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning. 261 F.3d, at 452 ("The findings of the state court that there was no disparate questioning of the *Batson* jurors ... [is] fully supported by the record"). Petitioner argues that the prosecutors' sole purpose in using disparate questioning was to elicit responses from the African-American venire members that reflected an opposition to the death penalty or an unwillingness to impose a minimum sentence, either of which justified for-cause challenges by the prosecution under the then applicable state law. This is more than a remote possibility. Disparate questioning did occur. Petitioner submits that disparate questioning created the appearance of divergent opinions even though the venire members' views on the relevant subject

might have been the same. It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination. *Batson*, 476 U.S., at 97, 106 S.Ct. 1712 ("Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose").

As a preface to questions about views the prospective jurors held on the death penalty, the prosecution in some instances gave an explicit account of the execution process. Of those prospective jurors who were asked their views on capital punishment, the preface was used for 53% of the African-Americans questioned on the issue but for just 6% of white persons. The State explains the disparity by asserting that a disproportionate number of African-American venire members expressed doubts as to the death penalty on their juror questionnaires. This cannot be accepted without further inquiry, however, for the State's own evidence is inconsistent **[345]** with that explanation. By the State's calculations, 10 African-American and 10 white prospective jurors expressed some hesitation about the death penalty on their questionnaires; however, of that group, 7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description.

There is an even greater disparity along racial lines when we consider disparate questioning concerning minimum punishments. Ninety-four percent of whites were informed of the statutory minimum sentence, compared to only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity. *Pierre v. Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536, 83 L.Ed. 757 (1939) ("'The fact that the testimony ... was not challenged by evidence appropriately direct, cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be

assumed that the State would have refrained from introducing it" (quoting *Norris v. Alabama*, 294 U.S. 587, 594-595, 55 S.Ct. 579, 79 L.Ed. 1074 (1935))). Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex.Crim.App.1989). It follows, in our view, that a fair interpretation of the record on this threshold examination in the COA analysis is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire. *Batson, supra*, at 93, 106 S.Ct. 1712 ("Circumstantial evidence of invidious intent may include proof of disproportionate impact... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'").

[346] We agree with petitioner that the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past. App. 788 (noting that a prosecutor admitted to requesting a jury shuffle "because a predominant number of the first six, eight or ten jurors were blacks"). Even though the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection.

Finally, in our threshold examination, we accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. Evidence presented at the *Swain* hearing indicates that African-Americans almost categorically were excluded from jury service. *Batson*, *supra*, at 94, 106 S.Ct. 1712 ("Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination' "); *Vasquez v. Hillery*, 474 U.S. 254, 259, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that 'chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more'" (quoting *Hill v. Texas*, 316 U.S. 400, 404, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942))); *Hernandez v. Texas*, 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed. 866 (1954) ("But it taxes our credulity to say that mere chance resulted in there being **[347]** no members of this class among the over six thousand jurors called in the past 25 years"). Only the Federal Magistrate Judge addressed the import of this evidence in the context of a *Batson* claim; and he found it both unexplained and disturbing. Irrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case. Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.

In resolving the equal protection claim against petitioner, the state courts made no mention of either the jury shuffle or the historical record of purposeful discrimination. We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it. This failure, however, does not diminish its significance. Our concerns here are heightened by the fact that, when presented with this evidence, the state trial court somehow reasoned that there was not even the inference of discrimination to support a prima facie case. This was clear error, and the State declines to defend this particular ruling. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U.S., at 98, 106 S.Ct. 1712 (quoting Norris, 294 U.S., at 598, 55 S.Ct. 579).

[348] To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was "objectively unreasonable" in light of the record before the court. The State represents to us that petitioner will not be able to satisfy his burden. That may or may not be the case. It is not, however, the question before us. The COA inquiry asks only if the District Court's decision was debatable. Our threshold examination convinces us that it was.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion, but write separately for two reasons: First, to explain why I believe the Court's willingness to consider the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) limits on habeas relief in deciding whether to issue a certificate of appealability (COA) is in accord with the text of 28 U.S.C. § 2253(c). Second, to dis-

cuss some of the evidence on the State's side of the case--which, though inadequate (as the Court holds) to make the absence of a claimed violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), undebatable, still makes this, in my view, a very close case.

I

Many Court of Appeals decisions have denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits-- without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right. See, *e.g.*, *Kasi v. Angelone*, 300 F.3d 487 (C.A.4 2002); **[349]** *Wheat v. Johnson*, 238 F.3d 357 (C.A.5 2001).[1] The Court today disapproves this approach, which improperly resolves the merits of the appeal during the COA stage. Ante, at 1036, 1039-1040. Less clear from the Court's opinion, however, is why a "circuit justice or judge," in deciding whether to issue a COA, must "look *to the District Court's application of AEDPA* to [a habeas petitioner's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason." *Ante*, at 1039 (emphasis added). How the district court applied AEDPA has nothing to do with whether a COA applicant has made "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), so the AEDPA standard should seemingly have no role in the COA inquiry.

Section 2253(c)(2), however, provides that "[a] certificate of appealability *may issue ... only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphasis added.) A "substantial showing" *does not entitle* an applicant to a COA; it is a necessary and not a sufficient condition. Nothing in the text of § 2253(c)(2) prohibits a circuit justice or judge from imposing additional requirements, and one such additional requirement has been

[1] In what can be regarded as a logical development from the error of analyzing a request for a COA like a merits appeal, some courts have simply allowed merits appeals to be taken *without* a COA--in flat contravention of . See, *e.g.*, *Bates v. Lee*, 308 F.3d 411 (C.A.4 2002).

approved by this Court. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (holding that a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but *also* must demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling).

The Court today imposes another additional requirement: A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his **[350]** constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. *Ante*, at 1039. To give an example, suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, *even if* the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of § 2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d). This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

II

In applying the Court's COA standard to petitioner's case, we must ask whether petitioner has made a substantial showing of a *Batson* violation and also whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA. The facts surrounding petitioner's *Batson* claims, when viewed in light of § 2254(e)(1)'s requirement that state-court factual determinations can be overcome only by clear and convincing evidence to the con-

trary, reveal this to be a close, rather than a clear, case for the granting of a COA.

Petitioner maintains that the following six African-American jurors were victims of racially motivated peremptory strikes: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carrol Boggess. As to each of them, the State proffered race-neutral explanations for its peremptory challenge. Five were challenged primarily because of their views on imposing the death penalty ([351] Rand, Kennedy, Bozeman, Warren, and Boggess), and one (Fields) was challenged because (among other reasons) his brother had been convicted of drug offenses and served time in prison. By asserting race-neutral reasons for the challenges, the State satisfied step two of *Batson*. See *Purkett v. Elem*, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). Unless petitioner can make a substantial showing that (*i.e.*, a showing that reasonable jurists could debate whether) the State fraudulently recited these explanations as pretext for race discrimination, he has not satisfied the requirement of § 2253(c) (2). Moreover, because the state court entered a finding of fact that the prosecution's purported reasons for exercising its peremptory challenges were not pretextual, App. 878, a COA should not issue unless that finding can reasonably be thought to be contradicted by clear and convincing evidence. See § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). *Ante*, at 1039.

The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white venireman similarly situated to the six aforementioned African-American veniremen. Although petitioner claims that two white veniremen, Sandra Hearn and Marie Mazza, expressed views about the death penalty as ambivalent as those expressed by Rand, Kennedy, Bozeman, Warren, and Boggess, the *voir dire* transcripts do not clearly bear that

out. Although Hearn initially stated that she thought the death penalty was inappropriate for first-time offenders, she also said, "I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty." App. 694. She further stated that someone who was an extreme child abuser deserved the death penalty, whether or not it was a first-time offense. Reply Brief for Petitioner 14a. Hearn also made pro-prosecution statements about her distaste for criminal [352] defendants' use of psychiatric testimony to establish incompetency. *Id.*, at 17a. As for Mazza, her stated views on the death penalty were as follows: "It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." App. 519.

Compare those statements with the sentiments expressed by the challenged African-American veniremen. Kennedy supported the death penalty only in cases of mass murder. "Normally I wouldn't say on just the average murder case--I would say no, not the death sentence." *Id.*, at 216. Bozeman supported the death penalty only "if there's no possible way to rehabilitate a person ... I would say somebody mentally disturbed or something like that or say a Manson type or something like that." *Id.*, at 79. When asked by the prosecutors whether repeated criminal violent conduct would indicate that a person was beyond rehabilitation, Bozeman replied, "No, not really." *Ibid.* Warren refused to give any clear answer regarding his views on the death penalty despite numerous questions from the prosecutors. *Id.*, at 139- 140 ("Well, there again, it goes back to the situation, you know, sometimes"); *id.*, at 140. When asked whether the death penalty accomplishes anything, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't [sic]. Sometimes you have mixed feelings about things like that." *Ibid.* When asked, "What do you think it accomplishes when you feel it does?," Warren replied, "I don't know." *Ibid.* Boggess referred to the death penalty as "murder," *id.*, at 197, and said, "whether or not I could actually go through with murder--with killing another

person or taking another person's life, I just don't know. I'd have trouble with that," *ibid.* Rand is a closer case. His most ambivalent statement was "Can I do this? You know, right now I say I can, but tomorrow I might not." *Id.*, at 161 (internal quotation marks omitted). Later on **[353]** Rand did say that he could impose the death penalty as a juror. *Id.*, at 162-164. But Hearn and Mazza (the white jurors who were seated) also said that they could sit on a jury that imposed the death penalty. At most, petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza. That perhaps would have been enough to permit the state trial court, deciding the issue *de novo* after observing the demeanor of the prosecutors and the disputed jurors, to find a *Batson* violation. But in a federal habeas case, where a state court has previously entered factfindings that the six African-American jurors were not challenged because of their race, petitioner must provide "clear and convincing evidence" that the state court erred, and, when requesting a COA, must demonstrate that jurists of reason could debate whether this standard was satisfied. *Ante*, at 1039.

Fields, the sixth African-American venireman who petitioner claims was challenged because of his race, supported capital punishment. However, his brother had several drug convictions and had served time in prison. App. 124. Warren and Boggess, two of the African-American veniremen previously discussed, also had relatives with criminal convictions--Warren's brother had been convicted of fraud in relation to food stamps, *id.*, at 153, and Boggess had testified as a defense witness at her nephew's trial for theft, *id.*, at 211, and reported in her questionnaire that some of her cousins had problems with the law, Joint Lodging 43. Of the four white veniremen who petitioner claims also had relatives with criminal histories and therefore "should have been struck" by the prosecution--three (Noad Vickery, Cheryl Davis, and Chatta Nix) were actually so pro-prosecution that *they were struck by the petitioner*. *Id.*, at 111. The fourth, Joan Weiner, had a son who had shoplifted at the age

of 10. App. 511. That is hardly comparable to Fields's situation, and Weiner was a strong State's juror for **[354]** other reasons: She had relatives who worked in law enforcement, *id.*, at 510, and her support for the death penalty was clear and unequivocal, id., at 506, 511.

For the above reasons, my conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible.

With these observations, I join the Court's opinion.

Justice THOMAS, dissenting.

Unpersuaded by petitioner's claims, the state trial court found that "there was no purposeful discrimination by the prosecut[ion] in the use of ... peremptory strikes," App. 878. This finding established that petitioner had failed to carry his burden at step three of the inquiry set out in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Title 28 U.S.C. § 2254(e)(1) requires that a federal habeas court "presum[e]" the state court's findings of fact "to be correct" unless petitioner can rebut the presumption "by clear and convincing evidence." The majority decides, without explanation, to ignore § 2254(e)(1)'s explicit command. I cannot. Because petitioner has not shown, by clear and convincing evidence, that any peremptory strikes of black veniremen were exercised because of race, he does not merit a certificate of appealability (COA). I respectfully dissent.

I

A

The Court agrees, *ante*, at 1042, that the state court's finding at step three of *Batson* is a finding of fact ordinarily subject to § 2254(e)(1)'s presumption of correctness:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual **[355]** issue made by a State court shall be presumed to be correct. The applicant shall

have the burden of rebutting the presumption of correctness by clear and convincing evidence."

However, the Court implicitly rejects the obvious conclusion that the COA determination under § 2253(c) is part of a "proceeding instituted by an application for a writ of habeas corpus." Instead of presuming the state court's fact-findings to be correct, as § 2254(e)(1) requires, the Court holds that petitioner need only show that reasonable jurists could disagree as to whether he can provide clear and convincing evidence that the finding was erroneous. *Ante*, at 1041.

The Court's main justification for this conclusion is supposed fidelity to *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See *ante*, at 1040 ("'The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong' " (quoting *Slack*, *supra*, at 484, 120 S.Ct. 1595)). But neither *Slack* nor any other decision of this Court addressing the COA procedure has ever considered a "constitutional claim" that turns entirely on issues of fact. In these circumstances, it is the text of § 2254(e)(1) that governs.

Unlike the majority, I begin with the plain text of the statute that instructs federal courts how to treat state-court findings of fact. At issue is what constitutes a "proceeding" for purposes of § 2254(e)(1). The word, "proceeding," means "[t]he regular and orderly progression of a lawsuit, including *all acts and events between* the time of commencement and the entry of judgment." Black's Law Dictionary 1221 (7th ed.1999) (emphasis added). The COA, "standing alone, ... does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a 'party' on the other side. It is nothing more than a request for permission to seek review." *Hohn v. United States*, 524 U.S. 236, 256, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (SCALIA, J., dissenting).

[356] I agree with the majority that the existence of a COA is a jurisdictional prerequisite to the merits appeal.

Ante, at 1039. However, the Court takes a wrong turn when it implies that the merits appeal is part of the habeas process (or "proceeding") but the COA determination somehow is not. Overwhelming authority (including the majority opinion) confirms that § 2254(e)(1) applies to the merits appeal. See *ante*, at 1042; *Weaver v. Bowersox*, 241 F.3d 1024, 1030 (C.A.8 2001); *Putman v. Head*, 268 F.3d 1223, 1241 (C.A.11 2001); *Johnson v. Gibson*, 254 F.3d 1155, 1160 (C.A.10 2001); *Francis S. v. Stone*, 221 F.3d 100, 114-115 (C.A.2 2000); *Weeks v. Snyder*, 219 F.3d 245, 258 (C.A.3 2000); *Mueller v. Angelone*, 181 F.3d 557, 575 (C.A.4 1999); *Ashford v. Gilmore*, 167 F.3d 1130, 1131 (C.A.7 1999); cf. *Sumner v. Mata*, 449 U.S. 539, 546- 547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (pre-Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) factual deference provision with virtually identical language applies to merits appeal). The COA determination should be treated no differently, because § 2254(e)(1) draws no distinction between the merits appeal and the COA. The Court's silent conclusion to the contrary is simply illogical. The COA's status as the jurisdictional prerequisite for the merits appeal requires that both the COA determination *and* the merits appeal be considered a part of the same "proceeding."

The Court's rejection of this conclusion also conflicts with pre-AEDPA practice. Prior to AEDPA, access to a merits appeal in federal habeas corpus proceedings was governed by a mechanism similar to the COA, known as a certificate of probable cause, or CPC. See *Slack*, *supra*, at 480, 120 S.Ct. 1595. There was also a standard of factual deference similar to, though weaker than, the standard in § 2254(e)(1). See 28 U.S.C. § 2254(d) (1994 ed.).[2] Under

[2] The pre-AEDPA standard of factual deference provided:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit [enumerated exceptions omitted].... And in an evidentiary hearing ... the burden shall rest upon the

these provisions (indistinguishable **[357]** from AEDPA's for these purposes), courts concluded that § 2254(e)(1)'s predecessor applied directly to the CPC proceeding, without any filtering through the "debatability" standard the Court has used in both the CPC and COA contexts. See, *e.g.*, *Barnard v. Collins*, 13 F.3d 871, 876-877 (C.A.5 1994); *Cordova v. Collins*, 953 F.2d 167, 169 (C.A.5 1992). These cases support the straightforward notion that § 2254(e)(1), like its predecessor did with respect to CPC proceedings, applies directly to the COA proceeding.

The Court's decision in *Hohn*, *supra*, which holds that the COA determination constitutes a "case" in the court of appeals for purposes of this Court's jurisdiction under 28 U.S.C. § 1254, is not to the contrary. *Hohn* does not hold, nor does its logic require, that the COA determination be regarded as separate from the rest of the habeas proceeding. In fact, *Hohn* rejected the proposition that "a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits (3)27." 524 U.S., at 246, 118 S.Ct. 1969 (emphasis added). Indeed, *Hohn* analogized the COA to the filing of a notice of appeal, *id.*, at 247, 118 S.Ct. 1969, which in the civil context all would consider to be part of the same "proceeding" ("instituted by" a complaint) as the trial and merits appeal.

B

The Court also errs, albeit in dicta, when it implies that delayed state factfinding--here the two years between *voir dire* and the post-trial *Batson* hearing[3]--is an excuse for **[358]** weakened factual deference. *Ante*, at 1042. Even putting aside the fact that an appellate court on direct review should (and would) still give heavy deference to 2-year-old

applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

[3] Not all the factfinding was so hindered. Prosecutors gave reasons for 2 of the 10 strikes of black veniremen at the post-trial *Batson* hearing. One of those, Joe Warren, is at issue here. App. 856-860.

credibility findings,[4] this reasoning is in tension with the plain text of § 2254(e)(1) and ignores changes wrought by AEDPA to the role of federal courts on collateral review.

Unlike an appellate court's review of district court findings of fact for clear error, § 2254(e)(1) establishes a presumption of correctness. It requires that the federal habeas court assume the state court that entered the findings was the best placed factfinder with the most complete record and *only then* ask whether the petitioner can refute that factual finding by clear and convincing evidence. Procedural imperfections ordinarily will not affect this presumption; thus, it does not matter whether the state judge made his decision two years late or with a less-than-perfect record. Admittedly these conditions might increase the *odds* that a habeas applicant could locate helpful evidence, but to "presume" facts "correct" means a court cannot allow a habeas applicant to evade § 2254(e)(1) by attacking the process employed by the state *factfinder* rather than the actual *factfindings*.

This reading is confirmed by the changes worked by AEDPA. Section 2254(e)(1) does not, as its predecessor did, create exceptions to factual deference for procedural infirmities. For example, prior to AEDPA, a federal habeas court **[359]** would not defer to state-court determinations of fact if " the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U.S.C. § 2254(d)(2) (1994 ed.), "the material facts were not adequately developed at the State court hearing," § 2254(d)(3), or "the

[4] I am puzzled by the majority's willingness to hold against *respondent* the failure of prosecutors to testify at the post-trial *Batson* hearing. *Petitioner* could easily have requested that the reasons for the allegedly unconstitutional peremptory strikes be given again, and did not. The attorney representing the State at the post-trial *Batson* hearing made certain that both trial prosecutors were present to reiterate the reasons they gave in the record for striking the challenged black veniremen. App. 865. Petitioner's counsel explicitly refused the opportunity to do so when it was offered. *Ibid.* Furthermore, I fail to understand why a move that resulted in a more efficient hearing without redundant testimony should redound to the benefit of petitioner, who bears the burden of proof in this federal habeas corpus proceeding.

applicant did not receive a full, fair, and adequate hearing," § 2254(d)(6). The removal of these exceptions forecloses the use of marginal procedural complaints--such as a delay between *voir dire* and a *Batson* hearing--to determine whether or "how much" a federal habeas court will defer to state-court factfinding.

Section 2254(e)(1) simply cannot be read to contain an implied sliding scale of deference. I do not understand the Court to disagree with this view, however, as its dicta does not actually purport to interpret the text of § 2254(e)(1).[5]

II

Because § 2254(e)(1) supplies the governing legal standard, petitioner must provide "clear and convincing" evidence of purposeful discrimination in order to obtain a COA. Petitioner's constitutional claim under *Batson* turns on this fact and "reasonable jurists could debate," *ante*, at 1039 (internal **[360]** quotation marks omitted), whether a Batson violation occurred only if petitioner first meets his burden under § 2254(e)(1). And the simple truth is that petitioner has not presented anything remotely resembling "clear and convincing" evidence of purposeful discrimination.

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[5] I do, however, agree with the majority that the Court's decisions in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) *(per curiam)*, can be helpful in guiding a federal habeas court deciding a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For instance, both cases confirm that *Batson* step three turns on an evaluation of the prosecutor's proffered race-neutral justifications for the peremptory challenges at issue. *Purkett*, *supra* at 768-769, 115 S.Ct. 1769; *Hernandez*, 500 U.S., at 364-365, 111 S.Ct. 1859 (plurality opinion); *id.*, at 372, 111 S.Ct. 1859 (O'CONNOR, J., concurring in judgment); see also *Batson*, *supra*. Additionally, because *Hernandez's* clear error standard is less demanding of a criminal defendant than is of a habeas applicant, a federal habeas court can deny relief on § 2254(e)(1) grounds if it determines it would do so when reviewing the same facts for clear error. Cf. *Marshall v. Lonberger*, 459 U.S. 422, 434-435, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) ("We greatly doubt that Congress ... intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself").

A

The evidence amassed by petitioner can be grouped into four categories: (1) evidence of historical discrimination by the Dallas District Attorney's office in the selection of juries; (2) the use of the "jury shuffle" tactic by the prosecution; (3) the alleged similarity between white veniremen who were not struck by the prosecution and six blacks who were: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carroll Boggess; and (4) evidence of so-called disparate questioning with respect to veniremen's views on the death penalty and their ability to impose the minimum punishment.

The "historical" evidence is entirely circumstantial, so much so that the majority can only bring itself to say it "casts doubt on the State's claim that [discriminatory] practices had been discontinued before petitioner's trial." *Ante*, at 1038. And the evidence that the prosecution used jury shuffles no more proves intentional discrimination than it forces petitioner to admit that he sought to eliminate whites from the jury, given that he employed the tactic even more than the prosecution did.[6] Ultimately, these two categories of evidence do very little for petitioner, because they do not address the genuineness of prosecutors' proffered race-neutral reasons for making the peremptory strikes of these particular jurors.

In short, the reasons that Justice SCALIA finds this to be a "close case," *ante*, at 1045 (concurring opinion), are reasons that, under the correct reading of § 2254(e)(1), it is a *losing* **[361]** case. I write further to explore two arguments advanced by petitioner that the Court deemed helpful in establishing petitioner's "debatable" entitlement to re-lief, apparently because the majority's "debatability" inquiry requires a less-thorough review of the record and a more permissive attitude toward a COA movant's representations.

---

[6] Petitioner shuffled the jury five times; the prosecution did so only three times. Brief for Respondent 21.

B

As noted, petitioner argues the prosecution struck six blacks--Rand, Kennedy, Bozeman, Fields, Warren, and Boggess--who were similarly situated to unstruck whites. I see no need to repeat Justice SCALIA's dissection of petitioner's tales of white veniremen as ambivalent about the death penalty as Kennedy, Bozeman, Warren, and Boggess. *Ante*, at 1046-1048 (concurring opinion). However, the majority's cursory remark that "three of the State's proffered race-neutral rationales for striking [black] jurors pertained *just as well to some white jurors who were not challenged and who did serve on the jury*," *ante*, at 1043 (emphasis added), is flatly incorrect and deserves some discussion.

For the three challenged peremptory strikes used on Fields, Warren, and Boggess, petitioner has not even correctly alleged the existence of "similarly situated" white veniremen. The majority's discussion of this subject is misleading, stating that "prosecutors explained that their peremptory challenges against six [black] potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the [veniremens'] own family history of criminality." *Ibid.* The implication is that for each of the six challenged veniremen, the prosecution gave all three reasons as justifications for the use of a peremptory strike. To clarify: Rand, Kennedy, Bozeman, Warren, and Boggess were struck for ambivalence about the death penalty. Fields, Warren, and Boggess were struck for having family members **[362]** with criminal histories. Bozeman and Fields were struck for making prodefense remarks about rehabilitation.

Simple deduction, and an analysis of petitioner's contentions that includes the *names* of these allegedly similar white veniremen, compare *ibid.*, reveals that petitioner has unearthed no white venireman who, like Warren and Boggess, was *both* ambivalent about the death penalty *and* related to individuals who had previous brushes with the law.[7] Petitioner also produces no white venireman who, like Fields, expressed prodefense views on rehabilitation and had a family member with a criminal history.[8] "Similarly situated" **[363]** does not mean matching any one of several reasons the prosecution gave for striking a potential juror--it means matching all of them.

This leaves Rand, Kennedy, and Bozeman.[9] Petitioner alleges that white jurors Hearn and Mazza were as ambiva-

[7] Petitioner directs the Court to white veniremen Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner as having family members with criminal histories, but points to white veniremen Sandra Hearn and Marie Mazza as equally ambivalent about the death penalty. Brief for Petitioner 22. Of course, as Justice SCALIA demonstrates, Hearn and Mazza were *not* ambivalent about the death penalty. *Ante*, at 1047 (concurring opinion).

[8] Again petitioner points to Vickery, Davis, Nix, and Weiner for similar family histories. Justice SCALIA has shown that none of these four were in fact similarly situated to Fields with respect to this justification. *Ante*, at 1048 (concurring opinion). Petitioner also alleges that Hearn made prodefense remarks about rehabilitation similar to those made by Fields. Again, no white venireman even allegedly fits *both* reasons given for striking Fields. Furthermore, even if Fields had only been struck for his views on rehabilitation, those views were in no way equivalent to those expressed by Hearn. Fields answered "yes" to the question whether he believed that "everyone can be rehabilitated." App. 118. Fields went on to say that "[i]t may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." *Ibid.* In contrast, Hearn stated that she "believe[d] in the death penalty if a criminal cannot be rehabilitated." *Id.*, at 694.

Petitioner tries to muddy the waters by pointing out that Fields was, in other respects, a good State's juror because he supported the death penalty. Brief for Petitioner 24-25. However, that does not change the fact that Fields said that everyone could be rehabilitated (and thus might have been swayed by a penitent defendant's testimony) and Hearn insisted that some people could not be rehabilitated. In analyzing *Batson* claims the focus should not be on the "*reasonableness* of the asserted nonracial motive ... [but] rather [on] the *genuineness* of the motive." *Purkett*, 514 U.S., at 769, 115 S.Ct. 1769 (emphasis in original).

[9] The prosecution's stated reasons for striking Bozeman were that he was ambivalent about the death penalty and that he made prodefense

lent about the death penalty as these three struck black veniremen. Justice SCALIA has adequately demonstrated that this is absurd with respect to Kennedy and Bozeman, but I agree that petitioner makes a slightly better case with Rand. Ante, at 1048 (concurring opinion). However, since the burden is on petitioner to show, by clear and convincing evidence, that Rand was struck because of his race, I find this sliver of evidence, even when combined with petitioner's circumstantial evidence, insufficient to rebut § 2254(e)(1)'s presumption.

C

Petitioner's accounts of "disparate questioning" also amount to little of substance. Petitioner argues that the prosecution posed different questions at *voir dire* depending on the race of the venireman on two subjects: the death penalty and the minimum punishment allowed under law. Neither accusation can withstand a careful examination of the full record or help petitioner assemble the requisite clear and convincing evidence.

[364] 1

Respondent counters petitioner's complaints about the so-called "graphic formulation" or "script" by arguing that this depiction was used only with those potential jurors who "expressed reservations about the death penalty in their juror questionnaires." Brief for Respondent 17. The majority discounts this explanation, stating that "[t]his cannot be accepted without further inquiry." *Ante*, at 1043. Under my view, however, petitioner bears the burden of showing purposeful discrimination by clear and convincing evidence.

The Court's treatment of this issue focuses on the apparent disparity in treatment of 10 black veniremen and 10

remarks about rehabilitation. This is one case where the prosecution gave multiple reasons for a strike and petitioner actually correctly *alleged* the existence of a similarly situated white venireman, Hearn. Petitioner believes, albeit erroneously, see *ante*, at 1047-1048 (SCALIA, J., concurring), that Hearn expressed similar ambivalence about the death penalty *and* made prodefense remarks about rehabilitation.

white veniremen who were supposedly similar in their opposition to the death penalty. The majority notes that only 2 out of these 10 whites got the graphic description while 7 out of 10 blacks did. *Ante*, at 1043-1044. But the Court neglects to mention that the eight white veniremen who petitioner thinks should have received the graphic formulation, Reply Brief for Petitioner 15, n. 19, were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue. No trial lawyer would willingly antagonize a potential juror ardently opposed to the death penalty with an extreme portrait of its implementation. The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not.

The record demonstrates that six of these eight white veniremen were so opposed to the death penalty that they were stricken for cause without the need for the prosecution to spend a peremptory challenge. For example, John Nelson wrote on his questionnaire, "I believe that the State does not have the right to take anyone's life," Tr. of Voir Dire in No. F85-78668-NL (5th Crim. Dist. Ct., Dallas County, Tex.), p. 625 (hereinafter VDR) (internal quotation marks omitted), and testified flatly, "I would not be able to vote for the death **[365]** penalty."[10] *Id.*, at 614. Nelson was struck for cause. *Id.*, at 662-663. Linda Berk was "always" opposed to the death penalty, *id.*, at 1449, and felt so strongly on the subject that the prosecutor remarked upon her discomfort, after which she stated, "[y]ou're going to have to excuse me because I'm getting a little emotional, okay?" *Id.*, at 1445. Later, after she had begun crying, Berk was struck for cause. *Id.*, at 1478. Gene Hinson stated curtly, "I put on the form there that I didn't agree with it," *id.*, at 1648, and was struck for cause. Sheila White said, "I have always been

[10] Nelson was also a doctor and presumably did not need to have the lethal injection process described to him.

against ... the death penalty," *id.*, at 2056, and was struck for cause.

Even those two not struck for cause had firm views. Margaret Gibson said: "I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything," *id.*, at 485, and was struck by the prosecution with a peremptory strike. And James Holtz thought the death penalty appropriate only if a policeman or fireman was murdered. *Id.*, at 1021. I can apprehend simply no reason to fault the prosecution for failing to give a more graphic description of lethal injection to prospective jurors with such firm views against capital punishment.

I recognize that these *voir dire* statements only indirectly support respondent's explanation because the graphic script was typically given at the outset of *voir dire*--before the above quoted veniremen had the chance to give their stark answers. Nevertheless, all available evidence supports respondent's view that those who were unclear in their views on the death penalty *in their juror questionnaires* received the graphic formulation--and that those who were adamantly for *or against* the death penalty in their questionnaires did not.

The jury forms at issue asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?," offered potential jurors the [366] chance to circle "yes" or "no," and then asked them to "[p]lease explain your answer." See, *e.g.*, Joint Lodging 44 (Boggess questionnaire). Question 58 allowed potential jurors to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *Ibid.*

First, as already noted, the deeper and clearer opposition to the death penalty on the part of the eight whites who did not receive the graphic script (but petitioner thinks should have) indirectly supports respondent's contention that this opposition came out in their questionnaires (presumably by an answer of "no" to question 56 and an answer of "yes" to question 58). But this is not the only evidence supporting respondent's view. Hinson, a white venireman who did not receive the graphic formulation, stated during *voir dire* that he "put on the form there that [he] didn't agree with [the death penalty] for both moral and religious reasons." VDR 1648. Similarly, Nelson, a white venireman not receiving the graphic formulation, stated on his questionnaire, "I believe that the State does not have the right to take anyone's life." *Id.*, at 625 (internal quotation marks omitted). Fernando Gutierrez, a juror who received the graphic formulation, answered "yes" to question 56, but also "yes" to question 58, indicating he had "moral, religious, or personal beliefs" that would obstruct his voting for the death penalty despite the fact that he believed in it. Joint Lodging 205.

The prosecution treated the black veniremen no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs wouldn't prevent them from imposing a death sentence. See *id.*, at 12 (Bozeman), 20 (Fields), 28 (Warren), 36 [367] (Rand). The black veniremen who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing hesitation, rather than philosophical opposition, to the death penalty. Boggess answered "yes" to question 56 but also "yes" to question 58. *Id.*, at 44. Kennedy answered "yes" to question 56 but indicated that he believed in the death penalty "[o]nly in extreme cases, such as multiple murders." *Id.*, at 51. Troy Woods answered "no" to question 56, but also "no" to question 58, indicating he *did not* believe in the death penalty but would have no personal objection to imposing it. *Id.*, at 180. He wrote "that *[sic]* not punishment," in the space provided for question 56. *Ibid.* It happened that, while not completely clear about it in the questionnaire (and hence receiving the graphic formulation), Woods was an enthusiastic supporter of the death penalty, and he was, in fact, seated on peti-

tioner's jury. Further confirming respondent's explanation, black veniremen Linda Baker, Janice Mackey, Paul Bailey, and Anna Keaton all gave unclear responses to questions 56 and 58 and all received the graphic formulation. See Tr. of Pretrial Hearings in No. F85-78660-NL (5th Crim. Dist. Ct., Dallas County, Tex.) (Def.Exh. 7).[11]

[368] To sum up, the correlation between questionnaire answers and the use of the graphic script is far stronger than any correlation with race. Sixteen veniremen clearly indicated on the questionnaires their feelings on the death penalty,[12] and 15 of them did not receive the graphic script.[13] Eight veniremen gave unclear answers and those eight veniremen got the graphic script.[14] In other words, for 23 out of 24, or 96%, of the veniremen for whom questionnaire information is available, the answers given accurately predict

[11] Questions 56 and 58, and the responses thereto, are found on page 6 of each questionnaire. Baker did not circle "yes" or "no" in answering question 56, but wrote "[m]y strongest feeling is against the death penalty; *however, being aware of the overcrowding in jails and the number of murders[,] I would have to know the facts to make a decision....*" (Emphasis added.) Baker also did not answer question 58, writing "undecided" instead. Mackey answered question 56 "no," indicating she did not believe in the death penalty, and wrote "Thou Shall Not Kill" in the explanation space. She then proceeded to answer question 58 "no" as well. Bailey circled "yes" in answering question 56, but wrote in "NO" with a circle around it, along with such explanations as "yes for a major crime" and "[n]o *one* have [sic] the right to take *anothe [sic]* ones *[sic]* life." (Emphases in original.) He then circled "no" in answering question 58. Keaton circled "no," indicating she did not believe in the death penalty, when she answered question 56, writing "It's not for me to punished *[sic]* anyone." However she then circled "no" in answering question 58, indicating that she did not have any objection to imposing the death penalty.

[12] See VDR 1648 (Hinson), 625 (Nelson); Joint Lodging 12 (Bozeman), 20 (Fields), 28 (Warren), 36 (Rand), 125 (Mary Sumrow), 132 (Ronnie Long), 140 (Weiner), 148 (Mazza), 156 (Vivian Sztybel), 164 (Debra McDowell), 172 (Kevin Duke), 189 (Brenda Walsh), 197 (Filemon Zablan), 213 (Hearn).

[13] Sztybel received the graphic script. VDR 2828.

[14] Boggess, Kennedy, Baker, Mackey, Bailey, Keaton, Gutierrez, and Woods.

whether they got the graphic script.[15] Petitioner's theory that race determined whether a venireman got the graphic script produces a race-to-script correlation of only 74%--far worse.[16]

2

Petitioner fares no better with his allegation that the prosecution employed two different scripts on the basis of **[369]** race when asking questions about imposition of the minimum sentence. Indeed, this disparate questioning argument is as flawed as the last one. Respondent admits that the different questioning on minimum sentences was used as an effort to get veniremen the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ the "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic formulation.

Seven black veniremen were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. Rand, Kennedy, Bozeman, Warren, and Boggess' views on the death penalty have all been exhaustively discussed. This leaves Baker and Fields. Baker's views on the death penalty were so clearly ambivalent that she is not even the subject

[15] This analysis considers Hinson and Nelson as being clearly opposed to the death penalty in their questionnaires (answering question 56 "no" and question 58 "yes") and Kennedy as being ambiguous (though in fact he answered question 56 "yes" and 58 "no"). Even without these assumptions, 13 out of 15 veniremen who answered "yes" to question 56 and "no" to question 58--indicating clear support for the death penalty--did not receive the graphic script. And seven out of seven of those answering "no" and "no" or "yes" and "yes"--indicating ambiguous or mixed feelings about the death penalty--or not answering clearly at all received the graphic script. This yields an accuracy rate of 20 out of 22, or 91%.

[16] For whites, 10 out of 12 did not get the graphic script. For blacks, 7 out of 11 did get the graphic script. This means race predicted use of the graphic script only 74% of the time.

of petitioner's *Batson* challenge. And Fields' family history of criminality and views on rehabilitation, as earlier discussed, *supra*, at 1053, and n. 7, convinced the prosecution to use a peremptory strike.[17] Finally, petitioner's objection to the prosecution's decision not to use the "manipulative" punishment script on Woods, Reply Brief for Petitioner 17, n. 23, makes no sense. Woods gave answers indicating he would be an excellent State's juror--why would the prosecution have tried to eliminate him? Of course, if petitioner were correct that the prosecution sought to eliminate blacks then one might expect that all methods, including the use of the "manipulative" script, would have been deployed against Woods, who happened to also be black.

As with graphic questioning, respondent's explanation goes unrebutted by petitioner. Unless a venireman indicated he would be a poor State's juror (using the criteria that **[370]** respondent has identified here) *and would not otherwise be struck for cause or by agreement*, there was no reason to use the "manipulative" script. Thus, when petitioner points to the "State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty," *ibid.*, he ignores the fact that of the 10 whites who expressed opposition to the death penalty, 8 were struck for cause or by agreement, *meaning no "manipulative" script was necessary to get them removed.* The other two whites were both given the "manipulative" script and peremptorily struck,[18] just like Rand, Kennedy, Bozeman, Fields, Warren, Boggess, and Baker.

Quite simply, petitioner's arguments rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record. Far from rebutting § 2254(e)(1)'s presumption, petitioner has perhaps not even demonstrated that reasonable jurists could debate whether

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[17] The prosecution in fact used peremptory strikes on all seven of these black veniremen.

[18] See Joint Lodging 110; VDR 502-511 (Gibson), 1046-1050 (Holtz).

he has provided the requisite evidence of purposeful discrimination--but that is the majority's inquiry, not mine. Because petitioner has not demonstrated by clear and convincing evidence that even one of the peremptory strikes at issue was the result of racial discrimination, I would affirm the denial of a COA.

APPENDIX D

VOIR DIRE TRANSCRIPT EXCERPTS

* * * *

[1572] Q Okay. I see the distinction you're making there. I understand a little better what you're saying now. Can I ask you, Mr. Vickery, how you feel personally about the death penalty? Do you feel that it serves a purpose in our society? I remember growing up that there were shows, Queen for a Day or something like that, and if you were governor for a day or if you had the power to decide in the State of Texas whether there was a death penalty or not, would you have the death penalty in certain circumstances or would you not have it at all? How do you feel about it?

A I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again as a human being, it's hard to say that you want to see someone die. I just honestly can't tell you, you know, how I feel.

Q I understand that these are difficult things and things we don't deal with every day or think about. You know that the death penalty exists and you know it's out there, but it is something that other people are dealing with.

* * * *

[1576] home, I see, but I bet you remember when he was growing up – at least the children I've been around. My little girl is four and she hasn't done this much yet, but children will come up to you and say, "Daddy, I want you to promise me something. I want you to promise you won't be mad if I tell you something." "Well, tell me what it is." "I'm not going to tell you. I just want you to promise you won't be mad before I tell you anything about it." You want to know what you're promising before you promise to do it. That's the kind of situation we're in here. I want you to know what you're promising to do and what you're dealing with before you have to do it.

I guess what it comes down to -- the bottom line is, Mr. Vickery, with that long-winded explanation, knowing that your actions could result through the system in the death of Thomas Joe Miller-El, do you feel like you could serve on a jury like this?

A Yes. I think I can make a decision. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I [1577] don't particularly want to make it, but I think I could.

Q Okay. You've said, Mr. Vickery, that you don't really know how you feel about the death penalty. Have you ever been opposed to it at any point? I mean, some people when they're younger and in college or whatever are opposed to it and as they get older, they become in favor of it or vice versa. Have you held strong feelings one way or the other ever?

A No, I haven't.

Q Okay. So this is just something that you haven't spent a great deal of time being concerned with because you haven't had to deal with it?

A That's correct. You know, you read about it and you hear about it, but you're put in a spot where you've got to make the decision and it's a different story. I would be like anyone else. I can sit in front of a TV and say, "They ought to hang the guy." That's just in your thoughts at that time and you're not there making that decision. You're not pulling rope.

Q Right. And that's why we're

* * * *

No. 03-_____

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v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2004 one copy of the Petition for a Writ of Certiorari in the above-captioned matter was served by Federal Express, overnight delivery, to the party listed below.

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals acted consistently with this Court's prior opinion in determining – in light of the voir dire record in its entirety and all relevant evidence – that Miller-El has failed to show that the state courts' rejection of his *Batson* claim is unreasonable and has failed to rebut, by clear and convincing evidence, the state court's finding of no purposeful discrimination.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

ARGUMENT 5

I. The Question Presented for Review Is Unworthy of the Court's Attention. 5

II. As the Court below Correctly Determined, Miller-El Has Failed to Show That the State Courts' Rejection of His Batson Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Court's Finding of No Purposeful Discrimination. 6

A. The record supports the trial judge's finding that prosecutors struck prospective jurors based on their views, not on race. 8

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State. 16

C. Prosecutors did not engage in disparate questioning based on race. 21

1. Graphic Script 22

2. Minimum Punishment 25

D. The lower court correctly concluded that Miller-El's evidence of historical discrimination in Dallas County and evidence of prosecutors' use of jury shuffles – while marginally relevant – was insufficient to compel rejection of the trial judge's finding. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 8

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Caldwell v. Maloney, 159 F.3d 639 (1st Cir. 1998) 15

Chambers v. State, 784 S.W.2d 29 (Tex. Crim. App. 1989) 15,30,31

Hernandez v. New York, 500 U.S. 352 (1991) 7,8,9,16

Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997) 17

McCleskey v. Kemp, 481 U.S. 279 (1987) 9

Patton v. Yount, 467 U.S. 1025 (1984) 16

Purkett v. Elem, 514 U.S. 764 (1995) 7,31

Swain v. Alabama, 380 U.S. 202 (1965) 4,5,15,29

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7,31

United States v. Lance, 853 F.2d 1177 (5th Cir. 1988) 17

Wainwright v. Witt, 469 U.S. 412 (1985) 14,16

Constitutions, Statutes and Rules

U. S. Const., amend. XIV 3,4

28 U.S.C. § 2254 ..... *passim*

Sup. Ct. R. 10 6-7

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In an opinion issued on February 25, 2003, this Court concluded, based on a "threshold examination" of the record in this case, that the federal district court's rejection of Petitioner Thomas Joe Miller-El's *Batson*[1] claim was "debatable" and thus that the court of appeals had erred in not granting a certificate of appealability on the claim. Petitioner's Appendix (Pet. App.) at 44a (*Miller-El v. Cockrell*, 537 U.S. 322 (2003)). As Justice Scalia noted in his concurring opinion, however, the "conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible." Pet. App. at 50a. Thus, the Court remanded the case to the court below to determine whether Miller-El could "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." Pet. App. at 44a. Only then would he be entitled to federal habeas corpus relief.

Miller-El now seeks review of the court of appeals' opinion on remand from this Court affirming the district court's denial of relief. Miller-El accuses the court below of "flout[ing]" this Court's "explicit guidance" and "ignoring its explicit direction" in its treatment of Miller-El's claim, urging this Court to intervene to preserve its supervisory authority. He asserts also that the lower court misapplied *Batson* and 28 U.S.C. § 2254 in affirming the denial of relief. Miller-El's accusation is unfounded, however, as the court of appeals conscientiously followed the dictate of this Court's remand. The lower court granted a certificate of appealability, ordered full merits briefing from the parties, and conducted oral argument; then, "[h]aving carefully reviewed the record in this case, the parties' respective briefing and arguments," the court issued a well-reasoned, exhaustive opinion concluding

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

that Miller-El "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." Pet. App. at 22a. Furthermore, contrary to Miller-El's suggestions, the court below neither discounted certain evidence as irrelevant nor accepted "without question" the state court's credibility determinations; rather, the court considered all relevant evidence but found it insufficient in the final analysis to overcome the state trial judge's finding that prosecutors struck prospective jurors, not because of their race, but because of their unfavorable case-related views. Finally, Miller-El's argument that the court below misapplied *Batson* and § 2254 amounts to nothing more than a conclusory assertion that, because the court affirmed the denial of relief, it *must have* misapplied *Batson* and § 2254. Miller-El's petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

In the pre-dawn hours of November 16, 1985, Thomas Joe Miller-El and co-defendant Kennard Flowers robbed a Dallas motel at gunpoint. Motel employees Donald Hall and Doug Walker complied with all Miller-El's demands, handing over the cash drawer, opening the combination lock to the bellman's closet, and turning over their own valuable personal property. Miller-El and Flowers then bound and gagged the victims. After Flowers left the scene, Miller-El shot Hall and Walker twice each in the back as they lay face down in the bellman's closet. Hall survived to testify at Miller-El's trial, although Miller-El's shots had severed his spine, rendering him a paraplegic. Walker died on the bellman's closet floor.

Miller-El was indicted for capital murder. Jury selection took place over a span of five weeks in February and March of 1986. During this process, prosecutors peremptorily struck fourteen venire members, ten of whom were African-American. Miller-El objected to eight of these strikes,[2] asserting that prosecutors were discriminating against African-American venire members based on race in violation of the Equal Protection Clause of the Fourteenth Amendment. As to each African-American panelist challenged, the State proffered its race-neutral, case-related reasons for exercising the challenge.[3] The jury finally selected consisted of two white males, seven white females, an African-American male, a Filipino-American male, and a Latino male.

Miller-El then filed a motion to quash the jury panel based on this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965),[4] arguing that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. At a pretrial hearing on the motion, Miller-El presented evidence regarding historical jury selection practices in the Dallas County District Attorney's Office. *See*, Joint Appendix (JA) 723.[5] At the conclusion of the hearing, the trial judge found that there was no evidence presented indicating any systematic exclusion of African-Americans as a matter of policy by the District Attorney's Office and that Miller-El had failed to establish a *Swain* violation.

The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, this Court issued its opinion in *Batson*. On direct appeal, Miller-El challenged his jury selection under the *Batson* standard. The Texas Court of Criminal Appeals found that Miller-El had established a prima facie claim under *Batson's* first step based on the disproportionate number of African-Americans stricken. *Miller-El v. State*, 748

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[2] Miller-El did not object to State's strikes of venire members Joe Warren and Paul Bailey contemporaneous with the strikes.

[3] With the exception of venire members Warren and Bailey, *see* Note 2, *supra*, the State set forth its race-neutral reasons for exercising these peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing, the State merely asked that the trial judge take judicial notice of that prior testimony. Transcript of Batson Hearing ("BH") 12. Because defense counsel did not object to the State's exercise of strikes against Warren and Bailey contemporaneous with the strikes, the State did not give its race-neutral reasons until the subsequent *Batson* hearing.

[4] Miller-El's trial took place before this Court's decision in *Batson*; therefore, *Swain* represented the precedent controlling a claim that prosecutors exercised peremptory strikes in a purposefully discriminatory manner.

[5] References are to the Joint Appendix filed with the merits briefs in this Court in *Miller-El v. Cockrell*, No. 01-7662.

S.W.2d 459, 460 (Tex. Crim. App. 1988). The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

At the *Batson* hearing, conducted on May 10, 1988, the defense relied on the evidence it had presented at the *Swain* hearing without offering any trial-related evidence more applicable in a *Batson* context.[6] JA 840. The State objected to its admission, arguing that the evidence was irrelevant under *Batson* since it did not bear on the prosecutor's conduct in Miller-El's case. JA 842. The court overruled the State's objection, however, and admitted the evidence, commenting that "[w]hat weight, if any, I will give it, I certainly reserve for myself." JA 843. Prosecutors testified regarding their reasons for striking venire members Paul Bailey and Joe Warren, for whom no reasons had been given at trial,[7] and the State asked the court to take judicial notice of the explanations given during voir dire for its strikes of the remaining venire members. JA 866. Thereafter, the court issued written findings, determining that the prosecution's explanations were race-neutral and negated any inference of purposeful discrimination. JA 873-878.

Miller-El challenged these findings on direct appeal. The Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutor's racially neutral reasons and concluded that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." JA 881.

Miller-El advanced his *Batson* claim again in his federal habeas corpus petition. A United States magistrate judge recommended denying habeas corpus relief, concluding that

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[6] Miller-El did not advance his disparate treatment and disparate questioning arguments until federal habeas corpus proceedings. Nonetheless, the state trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that the prosecutors did not engage in disparate treatment or disparate questioning based on race. *See* JA 878.

[7] Defense counsel had failed to object to the State's exercise of peremptory strikes against Bailey and Warren at the time of the strikes; therefore, the State had not offered race-neutral reasons.

the record supported the trial judge's finding that Miller-El had failed to prove purposeful discrimination. JA 920. After conducting a de novo review of the magistrate's disposition and hearing arguments from counsel, the district judge denied relief based on the magistrate's findings and recommendation. JA 942. The court below denied Miller-El's request for a certificate of appealability. JA 961.

This Court granted Miller-El's petition for writ of certiorari to review the court of appeals' denial of a COA. 534 U.S. 1122 (2002). Then in an opinion issued on February 25, 2003, this Court concluded, based on a "threshold examination" of the record, that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and thus that the court below had erred in not granting a COA on the claim. Pet. App. 44a. The Court remanded the case to the court below to determine whether Miller-El could "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." Pet. App. 44a. Consistent with this directive, the court below granted COA, ordered full briefing on the merits from the parties, and conducted oral argument. Then on February 26, 2004, the lower court issued its opinion affirming the district court's denial of relief, concluding that Miller-El had "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." Pet. App. at 22a. Miller-El's petition for writ of certiorari follows.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Rule 10(a) further provides that the Court, in deciding whether to exercise its discretion to grant review, may consider whether a court of appeals "has so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP.

CT. R. 10(a) (cited in Miller-El's Petition at I). Finally, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

Miller-El's petition presents no compelling reason to justify this Court's exercise of its certiorari jurisdiction. Miller-El's assertions to the contrary, the lower court did not ignore the mandates of this Court's opinion; rather, it conscientiously followed the Court's directive, granting a certificate of appealability, ordering full merits briefing, conducting oral argument, and carefully reviewing the entire record and the briefing and arguments of the parties before affirming the district court's denial of relief. Furthermore, Miller-El concedes, as he must, that the lower court properly stated the law applicable to review of his claim; but, in any event, he has failed to show that the lower court misapplied *Batson* or 28 U.S.C. § 2254. Certiorari review should, therefore, be denied.

II. As the Court Below Correctly Determined, Miller-El Has Failed to Show That the State Courts' Rejection of His *Batson* Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Court's Finding of No Purposeful Discrimination.

In *Batson v. Kentucky*, this Court introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the venire member in question.[8] *Id.* at 97-98. Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98. Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges

[8] To satisfy the second part of the three-step analysis, the prosecutor need only give an explanation based on something other than race. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* Moreover, the reason offered need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97.

are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981)); *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Furthermore, a trial judge's factual finding at *Batson*'s third step is necessarily accorded great deference on appellate review. Even on direct review, a reviewing court may overturn a state trial court's finding on the issue of discriminatory intent only if it is convinced that the determination was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality); *see also id.* at 372 (O'Connor, J., joined by Scalia, J., concurring) (agreeing with plurality that Court reviews for clear error trial court's finding as to discriminatory intent). And where, as here, the claim is before the Court on federal habeas review, the trial judge's determination must be upheld unless it is unreasonable; the trial judge's finding is presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). *See also Miller-El v. Cockrell*, 123 S. Ct. at 1041.

Miller-El concedes that the lower court correctly set forth these standards in its opinion. He argues nonetheless that the court merely paid "lip service" to the standards and did not actually properly apply them. Petition at 8. A review of the lower court's opinion belies this assertion. Indeed, Miller-El's conclusory argument that the lower court misapplied the legal standards applicable to his case devolves into merely a disagreement with the court's ultimate resolution of his claim.

Miller-El complains that the court below repeated errors contained in its original opinion vacated by this Court by failing to fully consider all relevant evidence, including that presented to support a prima facie case, and accepting "without question" the state trial judge's credibility determinations. But the lower court's opinion shows that it carefully reviewed the trial record and the evidence presented by Miller-El and determined that the evidence simply was not sufficient to compel rejection of the trial judge's finding of no purposeful discrimination. In making this determination, the lower court did not discount any evidence as irrelevant, and it carefully considered the evidence to determine whether it

impugned the trial court's finding. But in the final analysis, the court determined that the trial court's finding of no purposeful discrimination was supported by the record and that Miller-El's proffered evidence did not rebut that finding by clear and convincing evidence.

A. The record supports the trial judge's finding that prosecutors struck prospective jurors based on their views, not on race.

As the lower court concluded, the record supports the trial judge's finding that the challenged venire members were struck because of their case-related views, not because of their race. Throughout jury selection in this case, prosecutors followed a consistent voir dire strategy of identifying and removing prospective jurors who expressed opposition to or hesitancy about the death penalty. This strategy motivated the prosecutors' questioning of prospective jurors, their pursuit of for-cause challenges, and their exercise of peremptory challenges.

It was the divergence of views of minority versus non-minority veniremen, rather than any impermissible discriminatory purpose, that resulted in the racial disparity in the State's exercise of its peremptory strikes.[9] Plainly, the mere fact that the impact of the State's legitimate voir dire strategy bore more heavily on African-American veniremen does not prove purposeful discrimination. In addressing a *Batson* claim, a reviewing court "must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" *Hernandez*, 500 U.S. at 359-360 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977)). *See also McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.").

A review of the challenged venire members' testimony on voir dire is instructive. Roderick Bozeman, the first African-American venire member interviewed, stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person," for instance, a "mentally disturbed" person or "a Manson type." JA 79. If he thought there was a chance the defendant could be rehabilitated, he did not think the death penalty was appropriate. JA 89. Furthermore, according to Bozeman, repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. JA 79. Bozeman classified himself as the type of person who believes in the death penalty in principle, but who could not actually serve on a capital jury. JA 79-80. Finally, Bozeman stated that even if the evidence compelled "yes" answers to the special issues, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. JA 90-91. The State exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence, and his belief that a prior pattern of conduct would not be sufficient to render a defendant deserving of a death sentence.[10] JA 102.

Prospective juror Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury. JA 108, 111. However, after noting that the possibility of rehabilitation would be a factor he would consider in assessing a death sentence, Fields asserted his personal religious belief that no one is beyond rehabilitation. JA 118. As Fields concluded, ". . . I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life

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[9] Of the veniremen called for jury service in this case, more than seventy percent of non-minority veniremen had no qualms about either the death penalty generally or their willingness to assess it in an appropriate case. Conversely, only two of fifteen African-American veniremen expressed no qualms about the death penalty.

[10] With the exception of venire members Joe Warren and Paul Bailey, *see* Note 11, *infra*, the State set forth its race-neutral reasons for exercising these peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing, the State merely asked that the trial judge take judicial notice of that prior testimony. JA 866-68.

around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." JA 118. Additionally, as reflected in both Fields' questionnaire and in questioning by the State, Fields' brother had served time numerous times in Dallas County for drug offenses. JA 124. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that the prospective juror's deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that the juror's brother had been convicted of a felony. JA 131-133.

Venire member Joe Warren repeatedly answered questions posed by the prosecutor in a noncommital manner, indicating ambivalence about the death penalty and his ability to impose it. When asked whether he believed in the death penalty, Warren stated, "there are some cases where I would agree, you know, and there are others that I don't." VDR 3:1526.[11] When the prosecutor described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, Warren responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." JA 139. When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that."JA 140. When asked whether he could make a decision between a life sentence and a death sentence, Warren equivocally replied, "I think I could." JA 142. When questioned about his ability to answer the future dangerousness special issue, Warren responded, "I suppose there's always that chance, but there again, you never know." JA 144. Finally, Warren stated, "Well, it's just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice. . . ." JA 146.

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[11] This response was edited from the joint appendix. *See* JA 137.

The State exercised a peremptory challenge to remove Warren. Subsequent to Miller-El's trial, at a hearing held in the trial court pursuant to *Batson v. Kentucky*, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as bases for his strike.[12] JA 857. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the State still had several peremptory challenges remaining.[13] JA 855, 859. As the prosecutor observed, an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses: Early in the process, an attorney flush with challenges might feel free to strike a marginal juror; whereas, later in the process, the attorney must be more cautious in expending the precious remaining strikes. JA 856, 859, 862-63. According to the prosecutor, had Warren been examined when the State had only one strike remaining, the prosecutor would not have exercised a challenge to remove him.[14] JA 859.

While venire member Edwin Rand had indicated on his questionnaire that he believed in the death penalty, at the outset of individual voir dire he described capital punishment as a "touchy subject." JA 158. Further into the examination, the prosecutor asked Rand whether he would describe himself as (1) a person who believes in the death penalty and can serve as a juror and assess the death penalty if warranted; (2) a person who believes in the death penalty but for whatever reason cannot actually participate as a juror and be involved in assessing the death penalty; (3) a person who does not believe in the death penalty but

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[12] Defense counsel did not object to the State's exercise of a peremptory strike against Warren contemporaneous with the strike. JA 154. Therefore, the State did not offer race-neutral reasons at that time.

[13] Warren was twenty-eighth of 108 venire members. JA 68. The State still had nine peremptory challenges remaining after exercising a challenge to remove Warren. JA 856.

[14] On cross examination by defense counsel, the prosecutor testified that he would have struck jurors Sandra Hearn and Fernando Gutierrez before Warren had they come up earlier in the process. JA 861-62.

could render a verdict according to the evidence; or (4) a person who does not believe in the death penalty and cannot participate as a juror in the assessment of a death sentence. JA 160. Rand described himself as falling "[p]robably in between the first two, sitting in the jury and being able to say, 'Okay, he's guilty,' and being able to do that. But again, somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." JA 161. The State exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his ability to serve on a capital jury. JA 187.

Prospective juror Carrol Boggess also left the unmistakable impression that she was uncertain and hesitant about administering a death sentence. On her juror questionnaire, she answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Joint Lodging ("JL") 44. During individual voir dire, when asked about her views concerning the death penalty, Boggess responded, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." JA 192. Later she stated, "I'm not saying that I feel like I could impose the sentence myself – or I'm not going to be imposing the sentence, is that correct?" JA 194. After that, when asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure." JA 196. Then Boggess stated, ". . . but now whether or not I could actually go through with *murder* – with killing another person or taking another person's life, I just don't know. I'd have trouble with that." JA 197 (emphasis added). Additionally, Boggess had indicated on her juror questionnaire that she had testified as a defense witness at her nephew's theft trial. JL 43. The State exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as

a defense witness in her nephew's theft trial. JA 211.

Venire member Wayman Kennedy stated on his juror questionnaire that he believed in the death penalty "only in extreme cases." JL 51. He echoed that sentiment during individual voir dire, stating that he really only believed in the death penalty for mass murders or cases involving mutilation. JA 216. Kennedy questioned whether the death penalty could be appropriate punishment for a murder committed in the course of a robbery: "To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough. . . ." JA 217. Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could. . . ." JA 225. The State exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery (for which Miller-El stood accused), his view that the death penalty is only appropriate for mass murder, and the fact that "he hesitated for a great deal of time" before stating that he could answer the special issues according to the evidence. JA 248-249.[15]

Thus, all but one of the challenged venire members expressed ambivalence or hesitance about the death penalty either in their juror questionnaires or during their voir dire examinations; in some instances, there were additional considerations that informed the State's strikes, such as pro-defense views on rehabilitation and the criminal histories of family members.[16] The one challenged venire member who had expressed no qualms about

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[15] Miller-El does not challenge the State's strikes of the four other African-American venire members. It should be noted, however, that three of the four stated both in their juror questionnaires and during individual voir dire that they were opposed to the death penalty. Mackey (VDR 10:3949, 3951); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314). They were held qualified under *Wainwright v. Witt*, 469 U.S. 412 (1985), nonetheless based on their statements that they could render a verdict according to the evidence. The fourth of these venire members expressed ambivalence about the death penalty and indicated both in her juror questionnaire and during individual voir dire that she could not personally assess a death sentence. Baker (VDR 8:2990-91, 2996-97, 2998).

[16] Furthermore, that some of the veniremen who expressed hesitancy about assessing a death sentence later claimed they would be able to assess the death penalty does not render the

the death penalty – Billie Jeans Fields – had expressed pro-defense views regarding rehabilitation and had a brother with an extensive criminal history in Dallas County. As the lower court determined, the voir dire record amply supports the trial judge's finding that prosecutors struck these jurors because of their case-related views, not because of their race.

Nonetheless, Miller-El repeatedly criticizes the court of appeals' "uncritical" acceptance of the trial judge's findings. In particular, he faults the court below for failing to acknowledge the two-year delay between voir dire and the *Batson* hearing. Petition at 11, 20-21. However, under the facts of this case, that delay does not necessarily impugn the trial court's credibility determinations. In its threshold review of this case, this Court commented that, because of this delay, "the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." Pet. App. at 39a. However, as the Court also noted, prosecutors proffered their race-neutral reasons for all but one of the challenged strikes contemporaneous with the strikes. [17] *Id.* Indeed, at the subsequent *Batson* hearing, the State merely asked that the trial judge (the same trial judge who had presided over the voir dire) take judicial notice of that prior testimony. This case therefore stands in marked contrast to other cases tried during the same time period in which prosecutors were not required to proffer their reasons for strikes until years after the voir dire at issue took place. *See, e.g., Chambers v. States*, 784 S.W.2d 29 (Tex. Crim. App. 1989). Thoughat the time of voir dire, *Swain* did not require the trial judge

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prosecutors' strikes illegitimate. While these affirmations effectively insulated them from a challenge for cause, a prosecutor's explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. A prosecutor is certainly allowed to conclude that a prospective juror's initial indecision may not bode well for the State. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir. 1998) ("[T]he prosecutor had no obligation either to ignore [the prospective juror's comments about her reluctance] or to accept at face value [the prospective juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.").

[17] Because defense counsel did not object to the State's exercise of strikes against Warren and Bailey contemporaneous with the strikes, the State did not give its race-neutral reasons until the subsequent *Batson* hearing.

to engage in the three-step analysis later espoused in *Batson*, the record in this case shows that the trial judge was presented with the defense's objection to the strikes and the State's race-neutral reasons for the strikes contemporaneous with and in the context of the voir dire process.

The deferential treatment of the trial judge's determination is grounded in the obvious advantage he has over reviewing courts in assessing the facts. He has witnessed the entire jury selection process as it has unfolded, in this case over the expanse of more than a month. He has had the unique advantage of observing the demeanor of both prosecutors and prospective jurors. Indeed, in the *Batson* context, the trial judge is essentially a witness to the very conduct alleged to be discriminatory. The credibility of the prosecutor is the deciding factor in a *Batson* claim, *Batson*, 476 U.S. at 98 n.21, and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within the trial judge's province.'" *Hernandez*, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Equally critical to the trial judge's appraisal of the prosecutors' credibility is the trial judge's observations of veniremen. "The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984) (citation and quotation omitted). Thus, a trial judge's ability to witness prospective jurors' "[d]emeanor, inflection, [and] the flow of the questions and answers" places him in the best position to gauge whether the prosecutors' reasons for striking particular jurors were credible or pretextual. *Id.* at 1038 n.14. These principles apply with equal force here where the trial judge was presented with the defense objections to strikes and the State's reasons for strikes during the voir dire process.

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State.

Significantly, as the lower court found, Miller-El's argument that the State treated similarly situated white veniremen differently is not borne out by the evidence. While this Court's threshold inquiry into this case led it to note that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury," Pet. App. at 39a, further scrutiny of the record revealed that the State approached similarly situated veniremen on equal grounds based on their individual views and circumstances, and not based on race. Miller-El's assertions to the contrary ignore the voir dire record as a whole and the reality of a jury selection process that requires litigants to assess innumerable variables and intangibles in exercising their peremptory challenges.

Disparate treatment cannot be imputed in every situation where the State rejects one venire member with the same characteristics as another venire member who is accepted. Indeed, the decision to strike a particular panelist "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997) (noting that both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

But even on a cold record it is clear that prosecutors approached similarly situated panelists on equal grounds. The State pursued challenges for cause to remove numerous non-minority panelists who had expressed opposition to or ambivalence concerning the death penalty.[18] The State secured the excusal by agreement of two additional non-minority venire

[18] Nelson (Voir Dire Record (VDR) 2:663); Sohner (VDR 2:716-17); Berk (VDR 3:1478); Hinson (VDR 4:1696); White (VDR5:2101); Willard (VDR 8:3153).

members who had expressed opposition or ambivalence.[19] Finally, when challenges for cause were unavailing, the State peremptorily struck three non-minority venire members who had expressed opposition to or ambivalence concerning the death penalty.[20] Significantly, the State also peremptorily struck a non-minority venire member who had expressed a firm belief in the death penalty but who also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated.[21]

None of the non-minority venire members who were selected to serve on Miller-El's jury shared views or circumstances comparable to those of the challenged African-American panelists. Miller-El points to prospective juror Fields as an African-American panelist similarly situated to white panelists not struck by the State. *See* Petition at 22. He likens Fields – who was struck by prosecutors based on their concern that his deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony – to white panelists Sandra Hearn, Kevin Duke, and Noad Vickery. But the comparisons do not withstand scrutiny.

Sandra Hearn stated firmly both in her juror questionnaire and throughout individual voir dire that she believed in the death penalty and could assess the death penalty in an appropriate case. VDR 11:4541, 4580-81. While she expressed a belief that someone should not be sentenced to death on a first offense,[22] she made it clear that the prior offense would not have to be a murder, it could be a robbery or some other lesser criminal act of violence. VDR 11:4541-43, 4562. Hearn stated unequivocally that she could base a death sentence on

[19] Girard (VDR 6:2542, 2575); Evans (VDR 6:2638).

[20] Gibson (VDR 2:485, 523); Holtz (VDR 2:1018-19); Whaley (VDR 10:3748).

[21] Crowson (VDR 3:1211).

[22] As Hearn stated, "I think when a murder is committed, whether it is purposely or – a sixteen year old boy or something, this is his first offense, no I do not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation." VDR 11:4583-84.

the facts of the crime and evidence of prior violent crimes. *Id.* She stated that she personally felt the death penalty should be available for not only murder, but also severe torture and extreme child abuse. VDR 11:4544. Hearn also volunteered that she had a great deal of respect for police officers based on the facts that her father was a retired FBI agent and that she had daily contact with police officers through her employment. VDR 11:4570-72, 4578. Defense counsel apparently recognized that Hearn was a prosecution-prone venire member, submitting her for challenge for cause on numerous grounds.[23] VDR 11:4610. When the trial judge found her qualified, defense counsel objected to her being seated as a juror and asked for additional peremptory challenges.[24] Indeed, in arguing on direct appeal that the trial judge erred in denying that challenge for cause, defense counsel[25] wrote:

> **If ever – if ever** – there was a Venireperson that should have been excluded for cause from the Jury in this case, or any capital Murder Jury, it was Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs. . . . Appellant did not have any remaining Peremptory Challenges to use to exclude [] HEARN, who was truly an objectionable and unacceptable juror, from becoming the twelfth juror in Appellant's case. In fact, Appellant probably would have tried it with eleven, without MS. HEARN. Appellant therefore strongly asserts that severe and devastating harm can be clearly shown and established and is evidenced in the Record in this case in denying Appellant's Challenge for Cause to SANDRA HEARN.

Miller-El's Motion for Rehearing at 15-16 (filed in Tex. Crim. App. Nov. 30, 1992) (emphasis in original); *see also* Brief for the Appellant at 27-31(filed in Tex. Crim. App.

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[23] Furthermore, as the prosecutor testified at the *Batson* hearing, Hearn may well have been struck by the State as a "marginal" juror had she been examined earlier in the jury selection process. JA 862.

[24] The defense had expended its last peremptory challenge to remove the previous venire member, Max O'Dell. VDR 11:4526.

[25] E. Brice Cunningham, who represented Miller-El at trial, also represented him on direct appeal.

Apr. 27, 1987) ("By no stretch of the imagination could MS. HEARNE be considered qualified as a fair juror in this case.").

Juror Kevin Duke also expressed clear support for the death penalty and confidence in his ability to assess it in an appropriate case, VDR 8:3264-66, and his positive views about rehabilitation were made not in the context of testing Duke's ability to assess a capital sentence, but in response to defense counsel's questioning of the juror's ability to disregard the possibility of parole in assessing the minimal allowable sentence (five years) for the lesser-included offense of simple murder. VDR 8:3313-14.

Fields' views concerning rehabilitation stand in sharp contrast to those of any other prospective juror of any race because his views were rooted in his deeply held religious belief *that all persons can be rehabilitated.* JA 118. Furthermore, Miller-El seems to fault the State for striking Fields when he "was more supportive of the death penalty than white jurors whom the State found qualified. . . ." Petition at 22. But he fails to acknowledge that Fields' general views regarding the death penalty were not the basis for the State's strike. Clearly, Fields favored the death penalty generally. But prosecutors were nonetheless concerned, based on Fields' firm belief that all persons can be rehabilitated, that he would not be a good State's juror.

And, of course, Fields' views on rehabilitation were not the only basis for the State's strike. Fields' brother had served in prison numerous times for drug convictions in Dallas County. JA 124. Miller-El seeks to compare these circumstances to those of white panelist Noad Vickery, but the comparison does not bear scrutiny.[26] Noad Vickery testified that his

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[26] Miller-El faults the court below for "attempt[ing] to justify the prosecutor's disparate treatment of potential jurors who had a family member with a criminal history with distinctions based on the particular circumstances of the relative's criminal episode." According to Miller-El, "such distinctions were not made by the prosecutors at the time, and cannot now be used to rationalize the prosecutors' motives." Petition at 24 n. 4. Miller-El fails to acknowledge, however, that he did not raise his arguments of disparate treatment of similarly situated jurors until federal habeas corpus proceedings. Apparently, Miller-El would require prosecutors to distinguish every non-minority prospective not struck in anticipation of juror comparisons a criminal defendant may

sister had been arrested and had served time in a California penitentiary when he was a teenager. VDR 4:1601-02. Vickery was fifty years old at the time of jury selection. JL 65. These circumstances are qualitatively different from those of Fields. First, the incident Vickery related obviously occurred many years before Miller-El's trial, whereas Fields' voir dire indicated his brother's problems with the law were ongoing. Second, Vickery's sister's crime, conviction, and incarceration occurred in California; Fields' brother had served in prison in Texas for crimes committed in Dallas County, the prosecuting authority in Miller-El's case. Third, Vickery related a single criminal incident regarding his sister; Fields related that his brother had been involved in several crimes. Finally, Vickery was a teenager when the incident involving his sister occurred; Fields was an adult.

Miller-El further asserts that Vickery shared "the precise combination of reasons the State used to justify striking Fields," a relative with a criminal history and ambivalence regarding the death penalty. Petition at 25. But, as set forth above, the circumstances of these panelists' relatives' criminal backgrounds are hardly similar; and, again, the State's strike of Fields was not based on his views regarding the death penalty generally. Furthermore, basic voir dire strategy counseled that, even if the State judged Vickery to be a less-than-ideal juror, given the hostility between Vickery and Miller-El's counsel apparent even on a cold record, there was no need for prosecutors to expend a precious peremptory strike to remove a juror defense counsel surely would seek to remove. In fact, the defense submitted Vickery for challenge for cause on the basis that he could not assess the minimum sentence for the lesser-included offense of murder. VDR 4:1626. After the trial judge held that Vickery was qualified, the defense exercised a peremptory challenge to remove him from the panel, though he provided no reason for the strike. VDR 4:1632, 1635-36. Fields and Vickery were not similarly situated. As the court below correctly determined, the voir dire record as a whole does not support Miller-El's argument that prosecutors struck the

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make in future appeals. *Batson* does not support such a requirement.

challenged panelists because of their race.[27]

C. Prosecutors did not engage in disparate questioning based on race.

The lower court also correctly found unavailing Miller-El's attempt to impute discriminatory intent to the prosecutors from their use of particular jury selection tactics. The fact that African-Americans were subjected to certain lines of questioning in disproportionate numbers is simply a function of the divergence of views between the African-American panelists and the non-minority panelists. While, as this Court noted, "[d]isparate questioning did occur," Pet. App. at 40a, the record supports the conclusion that this disparate questioning was not based on race.[28]

The record in this case reveals that the State's litmus test for prospective jurors was their views on capital punishment. This was the most significant motivating factor in not only its exercise of challenges for cause and peremptory challenges but also its questioning of prospective jurors. Prosecutors employed disparate questioning to ferret out veniremen whom they felt were ambivalent about imposing the ultimate punishment. They also

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[27] Miller-El also faults the court below for failing to gauge the potential impact of disparate questioning on prospective jurors views. *See* Petition at 21. Specifically, as this Court noted, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." Pet. App. 40a-41a. However, as set forth in subsection C, *infra*, the lower court concluded that prosecutors did not engage in disparate questioning based on race. This conclusion rendered unnecessary any evaluation of the impact of disparate questioning.

[28] Miller-El faults the state trial court for finding no disparate questioning. *See* Petition at 15. Significantly, however, Miller-El did not advance his disparate questioning argument until federal habeas proceedings. Nonetheless, the state trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that "no disparate prosecutorial examination of any of the veniremen in question has been shown." This finding is properly interpreted, in context, as a finding that Miller-El had shown no disparate questioning *based on race*. Obviously, prosecutors did not use the same script of questions with all prospective jurors regardless of their views as reflected in their juror questionnaires and during voir dire examination. The trial judge was certainly aware of this but found, nonetheless, that Miller-El had failed to show disparate questioning based on race.

employed disparate questioning in attempts to disqualify veniremen who had expressed what prosecutors perceived to be unfavorable views but who were not subject to disqualification on those grounds. However, they did not employ disparate questioning based on race. Rather, prosecutors utilized these legitimate jury selection tactics, aiming to identify and remove prospective jurors who had expressed views unfavorable to the State.

As Miller-El asserts, the prosecution used divergent questioning methods in two areas: veniremen's feelings about the death penalty and veniremen's ability to impose the minimum punishment for the lesser-included offense of murder.

1. Graphic Script

The State questioned all prospective jurors at length regarding their views on capital punishment. With the vast majority of veniremen, prosecutors simply informed them that the State was actively seeking the death penalty and that affirmative answers by the jury to the three questions submitted at the punishment phase would result in Miller-El being given the death penalty, then asked them an open-ended question concerning their feelings on capital punishment. With some prospective jurors, however, prosecutors described an execution in vivid detail. Nonetheless, the record does not support Miller-El's argument that prosecutors' use of this "graphic script" was based on race.

The record reveals that the African-Americans questioned with the graphic script at the outset of their examinations had given ambiguous or conflicting responses regarding their views on the death penalty in their juror questionnaires. [29] Likewise, some non-minority jurors who had expressed similar reservations about the death penalty were questioned using the same graphic formulation. The record therefore supports the conclusion that the graphic script was used to probe jurors' views about the death penalty.

Miller-El asserts that, even taking the prospective jurors' views into account, the graphic script was used more frequently with African-American jurors than with non-

[29] The prosecutors' "graphic script" questioning took place at the outset of voir dire, thus it was based only on information contained in juror questionnaires.

minority jurors. However, Miller-El fails to acknowledge that the eight white veniremen who he thinks should have received the graphic script "were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue.[30] . . . The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not." Pet. App. at 60a. The same holds true for the three death-penalty-opposed African-American jurors who did not receive the graphic script.[31]

Miller-El faults this theory as speculative given that the questionnaires of most white jurors are not part of the record. He asserts that this gap in the record is not attributable to him because he sought discovery of the remainder of the white jurors' questionnaires in federal district court "but was not granted access to this information." Petition at 17 n. 2. In fact, by the time Miller-El made his discovery request, the documents were apparently no longer in existence except for the seated jurors' questionnaires. Miller-El fails to explain why he did not make these documents part of the record *in state court* when the documents were unquestionably in existence and when he carried the burden of proving purposeful discrimination. Indeed, he did make the questionnaires of the peremptorily struck African-American panelists part of the record during the *Batson* hearing.

But in any event, the questionnaires that are part of the record – those of the twelve seated jurors and those of the ten prospective jurors for whom Miller-El originally raised Batson objections – support the conclusion that prosecutors used the graphic script to probe the views of prospective jurors who had given ambiguous or conflicting responses concerning their support for the death penalty on their questionnaires. Prosecutors did not

[30] Gibson (VDR 2:483); Nelson (VDR 2:603); Holtz (VDR 2:1016-17); Berk (VDR 3:1440-41); Hinson (VDR 4:1646); White (VDR 5:2053); Girard (VDR 6:2520-21); Willard (VDR 8:3090-91).

[31] V. Smith (VDR 2:926); Carter (VDR 4:1951-52); Mosley (VDR 7:2654-55).

generally utilize the graphic script when the panelists' support for *or opposition to* the death penalty was unambiguous.

The four African-Americans who did not receive the graphic script (whose questionnaires are contained in the record) – Bozeman, Fields, Warren, and Rand – all indicated unambiguous support for the death penalty in their questionnaires. [32] They all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence. It was not until subsequent voir dire examination that they expressed reservations.

The African-Americans who did receive the graphic script at the outset of their examinations had given conflicting answers on their questionnaires concerning their views on the death penalty. On her questionnaire, Carrol Boggess answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *See* DX 7. Wayman Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases." *Id.* Linda Baker stated on her questionnaire "[m]y strongest feeling is against the death penalty" and wrote "undecided" in response to the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *Id.* Troy Woods wrote "no" in response to the question "Do you believe in the death penalty?" *See* Exhibit 2 (questionnaires of seated jurors) attached to Miller-El's Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence (filed Dec. 8,1997), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D.Tex.). Janice Mackey wrote "no" in response to the question "Do you believe in the death penalty?" and added "Thou shall not kill." DX 7. In response to the question "Do you believe in the death penalty?" Paul Bailey circled "yes"

[32] Surely, if, as Miller-El suggests, prosecutors employed the graphic script to push African-Americans to express views that would subject them to challenge for cause, they would have used the graphic script on these panelists as well.

then wrote in "no." DX 7. Anna Keaton wrote "no" in response to the question "Do you believe in the death penalty?" DX 7.[33]

The seated jurors, whose questionnaires are also part of the record, further support this strategy. All who did not receive the graphic script – Sumrow, Long, Weiner, Mazza, McDowell, Duke, Walsh, Zablan, and Hearn – had answered questions 56 and 58 to indicate unambiguous support for the death penalty. Of the three seated jurors who did receive the graphic script, Gutierrez and Woods had given conflicting answers on their questionnaires concerning their views on the death penalty. Indeed, white juror Sztybel was the only juror who h[illegible]ambiguous support for the death penalty in her questionnaire but was [illegible]ed to the graphic script questioning. The record simply does not support Miller-El's assertion that prosecutors used the graphic script based on race.

2. Minimum Punishment

[illegible]estion African-Americans differently than non-minority veniremen concerning their willingness to impose the minimum punishment for the lesser-included offense of murder.[34] Again, prosecutors did utilize disparate questioning, but not based on race. With most veniremen, prosecutors identified the minimum penalty first, then asked whether the venire member could impose it. But with some, prosecutors employed a tactic by which they described the offense of murder, then asked what the prospective juror thought the minimum punishment should be, before informing him of the range allowed by law. However, the State did not engage in this divergent questioning based on race. The record shows that the prosecution employed this tactic with several veniremen, both African-

[33] Jeanette Butler's juror questionnaire is not contained in the record. However, her voir dire examination reveals that while she believed in the death penalty in principle, she was unwilling to participate as a juror in imposing a death sentence. VDR 4:1889.

[34] Unlike the "graphic script" questioning, which occurred at the outset of an examination, the minimum punishment questioning generally occurred toward the end of the examination; therefore, the State had not only the prospective juror's questionnaire to consider but also his previous voir dire responses.

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American and not, who had expressed views that, while not rendering them subject to a challenge for cause, were unfavorable to the State.[35]

Miller-El points to the fact that the State used this line of questioning with seven of eight African-Americans questioned on the issue, but with only two of thirty-six white panelists questioned on the issue. But again, closer scrutiny of the record reveals that this disparity cannot be attributed to race. The record shows that the seven African-Americans who received this line of questioning – Rand, Kennedy, Bozeman, Warren, Boggess, Baker, and Fields – all expressed anti-prosecution views, but were not subject to challenge for cause on that basis. The one African-American who received the "friendlier" line of questioning was Troy Woods, whose voir dire clearly identified him as an excellent State's juror. On the other hand, almost all white panelists who had expressed opposition to the death penalty were struck for cause or by agreement of the parties *without the need to resort to this line of questioning*. The two remaining – Gibson and Holtz – were subjected to the same challenged line of questioning and were peremptorily struck, just like Rand, Kennedy, Bozeman, Warren, Boggess, Baker, and Fields.

As the lower court concluded, prosecutors utilized the legitimate tactic of disparate questioning to identify and remove prospective jurors who had expressed views unfavorable to the State. Therefore, Miller-El's arguments of disparate questioning do not serve to rebut the state trial court's finding of no purposeful discrimination in the State's exercise of peremptory challenges.

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[35] Bozeman (VDR 1:307-312); Fields (VDR 1:432); Gibson (VDR 2:507-11); Holtz (VDR 2:1046-50); Warren (VDR 3:1545-50); Rand (VDR 4:1815-26); Boggess (VDR 4:2028-35); Kennedy (VDR 5:2194-2200); Baker (VDR 8:3007-08); Fernando Gutierrez (VDR 11:4396).

D. The lower court correctly concluded that Miller-El's evidence of historical discrimination in Dallas County and evidence of prosecutors' use of jury shuffles – while marginally relevant – was insufficient to compel rejection of the trial judge's finding.

Finally, contrary to Miller-El's assertions, the lower court did consider all the evidence proffered by Miller-El in support of his claim of purposeful discrimination – including the evidence proffered in support of his prima facie case – but concluded nonetheless that that evidence was insufficient to rebut the state trial judge's finding of no purposeful discrimination.

First, Miller-El errs in asserting that the court below "declined to consider the State's discriminatory use of jury shuffles, offering only the irrelevant observation that the defense had also requested shuffles." Petition at 14. The court did consider the evidence, but in the final analysis determined that it "does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the voir dire process including the jury shuffles." Pet. App. at 10a. In any event, Miller-El overstates the significance of the State's requests for jury shuffles and mischaracterizes the record in an attempt to portray the State as scheming to manipulate the jury shuffle process. He ignores the fact that the heart of the State's complaint to the defense's shuffle during the third week of jury selection was that defense counsel failed to thoroughly shuffle the juror cards. And he completely omits the fact that prosecutors voiced their complaint to the shuffle before they were even aware of the racial composition of the newly shuffled venire. Furthermore, the fact that a single unnamed prosecutor not involved in Miller-El's trial used the jury shuffle in a discriminatory manner in another case has little bearing on whether the prosecutors in Miller-El's case acted likewise. *See* Petition at 13-14. In any event, as the lower court concluded, any inference that can be drawn from such evidence cannot overcome the highly persuasive race-neutral explanations for the State's strikes, explanations which are supported by the record and were credited by the trial judge.

Second, the lower court did not, as Miller-El contends, discount the relevance of the

historical "pattern and practice" evidence presented by Miller-El in state court in support of his prima facie case.[36] *See* Petition at 11-12. Indeed, the court below described the evidence presented and noted that "the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable." Pet. App. at 9a. The court specifically acknowledged, consistent with this Court's directive, that "[t]his historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons." Pet. App. at 10a. It concluded nonetheless that "the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect." *Id.*

Miller-El points out the fact, noted by this Court in its prior opinion, that the state trial judge did not specifically mention the historical "pattern and practice" evidence in his findings. Petition at 10 (citing Pet. App. 44a). However, the record belies Miller-El's contention that the trial judge failed to consider all the evidence properly before him, including the pattern and practice evidence admitted at the *Swain* hearing. At the *Batson* hearing, the trial judge admitted into evidence, over the State's objection on relevancy grounds, the Sparling paper and all the testimony regarding historical jury selection practices in Dallas County originally admitted at the *Swain* hearing.[37] The trial judge apparently determined nonetheless (as he was certainly entitled to do) that such circumstantial evidence

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[36] Specifically, Miller-El asserts that the lower court refused to give this evidence any weight "because the court viewed it as relevant only to step one." Petition at 12. Review of the lower court's opinion belies this assertion.

[37] The trial judge clearly admitted the pattern and practice evidence over the State's objection on relevancy grounds. The mere fact that the trial judge did not specifically mention this evidence in his written findings is not a sufficient basis to assume that the trial judge did not consider the evidence. *See* Pet. App. 44a ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it.").

of discriminatory intent, which had no direct bearing on the actions of prosecutors in this case, was insufficient to prove purposeful discrimination in the face of the race-neutral, case-related reasons for the prosecutors' strikes documented abundantly by the record.

Miller-El also faults the court below for failing to address this Court's concern over the state trial court's determination – even in the fact of the pattern and practice evidence – that Miller-El had failed to establish a prima facie case under *Batson*. *See* Petition at 10 (citing Pet. App. 44a). However, in the merits briefing in the court below, the Director pointed out that the trial judge's findings themselves explain this seemingly insupportable determination: The finding of no prima facie showing was based not only on Miller-El's evidence but also on "the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective *Batson* hearing." JA 873-878. The judge explained that his analysis was based on then-existing lower court precedent interpreting the *Batson* decision, which counseled that *Batson* "requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination *as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.*" *Id.* (quoting *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987)) (emphasis added). Thus, the trial judge essentially collapsed *Batson*'s first step of determining whether Miller-El had made a prima facie showing into *Batson*'s third step of determining whether Miller-El had proved purposeful discrimination. While the trial judge undoubtedly erred as a matter of law in doing so, this legal error (based on then existing precedent) does not in any way cast doubt on his ultimate determination that Miller-El failed to prove purposeful discrimination.

Miller-El's reliance on the state court opinion in *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), is also futile. Initially, the *Chambers* opinion was not even before the trial judge, so it had no bearing on the inquiry before the court below. *See* 28 U.S.C. §

2254(d)(2) (limiting federal court's review to discerning whether the trial judge's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."). But even if the opinion were properly before the trial court, it would not impeach the trial judge's decision. Any inference that may be drawn from the mere fact that a prosecutor was involved in a single case, among hundreds he tried, that was reversed under *Batson* is insufficient to overcome the trial judge's finding that the State did not discriminate in this case. But in any event, to the extent the opinion indicates that these prosecutors discriminated against African-Americans in another case,[38] the opinions do little to prove that they did likewise in Miller-El's case, particularly in light of the undisputed race-neutral, case-related reasons for the strikes in this case.

Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. at 252-56); *Purkett v. Elem*, 514 U.S. at 768. Because Miller-El failed to satisfy his burden of proving discriminatory purpose, the trial judge found that the prosecutors did not act with discriminatory purpose. Miller-El's arguments on habeas review "rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record." Pet. App. at 65a. Thus, as the lower court held, he has failed to demonstrate that this determination is unreasonable in light of the record, and has likewise failed to rebut the finding by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, Miller-El's petition for writ of certiorari should be denied.

[38] It should be noted, however, that in *Chambers*, prosecutor Paul Macaluso was found responsible for striking only one of three African-Americans struck by the State. 784 S.W.2d at 31-32.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CAPITAL CASE

QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. §§ 2254(d)(2) and (e)(1).

TABLE OF CONTENTS

Page

CAPITAL CASE—QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

THE FIFTH CIRCUIT IGNORED THIS COURT'S GUIDANCE ABOUT HOW TO ANALYZE EVIDENCE OF RACIAL DISCRIMINATION 1

A. The Court Discounted Evidence Of Longstanding Discrimination In Jury Selection And Disregarded The State Courts' Failure To Address That Evidence 1

B. The Court Disregarded The Jury Shuffle Evidence 3

C. The Court Failed To Give Proper Weight To Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans 5

D. The Court Failed To Analyze The Treatment Of Similarly Situated Venire Members Properly 7

E. The Court Failed To Assess Whether The Trial Court's Judgment Was Entitled To Deference, And To Consider The Cumulative Weight Of The Evidence 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page(s)

Chambers v. *State*, 784 S.W.2d 29 (Tex. Crim. App. 1989) 3

Hernandez v. *New York*, 500 U.S. 352 (1991) 10

Respondent asserts (Opp. 7) that the court of appeals "carefully reviewed the trial record and the evidence presented by" Petitioner and "did not discount any evidence as irrelevant." But to the contrary, notwithstanding this Court's painstaking analysis last Term of every relevant category of evidence, the Fifth Circuit dismissed with barely an explanation two of the four categories of evidence of discriminatory intent. And in addressing the other two categories, it consistently disregarded conclusions this Court had reached and methodological guidance this Court had given.

To defend this result, Respondent's brief in opposition mostly recycles unsuccessful arguments the State made to this Court last Term. Thus it too drives home how little impact this Court's previous opinion has had on the Fifth Circuit's analysis of Petitioner's *Batson* claim. It also demonstrates the difficulty of making *Batson* meaningful at the crucial step-three evidence-weighing stage without more explicit modeling of the process by this Court.

This Reply necessarily delves once again into the details of the voir dire process. But this case does not turn on factual nuances. To the contrary, it presents a broad, fundamental issue. This Court has often used its supervisory authority to give guidance to the lower courts concerning methods for handling evidence and for implementing rules of criminal procedure. This case cries out for an exercise of that supervisory authority. For if the Fifth Circuit's widely watched decision goes uncorrected, its "dismissive and strained" approach to analyzing evidence of racial discrimination in jury selection (App. 40a) may well become a path-marking precedent for the lower courts, countermanding the teaching of this Court's *Miller-El* opinion.

THE FIFTH CIRCUIT IGNORED THIS COURT'S GUIDANCE ABOUT HOW TO ANALYZE EVIDENCE OF RACIAL DISCRIMINATION

A. The Court Discounted Evidence Of Longstanding Discrimination In Jury Selection And Disregarded The State Courts' Failure To Address That Evidence

Last Term, this Court held that the historical evidence that the "culture of the District Attorney's Office" was "suf-

fused with bias against African-Americans in jury selection" (App. 43a) was clearly relevant to the ultimate question of purposeful discrimination in Petitioner's jury selection. Yet the Fifth Circuit on remand simply refused to consider this evidence in assessing the plausibility of the prosecution's reasons for its peremptory strikes. Respondent insists (Opp. 28) that the court did take account of the evidence, or at least "acknowledged" it, but despite this Court's observation that "it goes without saying" that the historical evidence was relevant at step three, the court of appeals cabined its significance to step one, noting that it was of little importance specifically "because Miller-El has already met the burden under the first step." App. 10a.

This Court also faulted the state courts for making "*no mention* of . . . the historical record of purposeful discrimination" in evaluating Petitioner's claim. App. 44a (emphasis added). And it explained that this failure heightened the concern that the state courts had erred because, even when presented with this evidence of a pattern and practice of discrimination, the trial court "somehow reasoned that there was not even the inference of discrimination to support a prima facie case"—a clear error that the State subsequently declined to defend. *Id.* Yet the Fifth Circuit on remand continued to ignore these failings, insisting that the state trial court had "heard the historical evidence" and was "in the best position to make a factual credibility determination" (App. 10a)—despite the fact, noted by this Court, that the state court held its *Batson* hearing *two years* after the trial.

Respondent's only defense of the Fifth Circuit's continued uncritical embrace of the fundamentally flawed trial court decision is to resurrect two claims that this Court has already expressly rejected. Respondent contends (Opp. 27a-30a) that the state court *did* weigh the powerful historical evidence of racial discrimination in the D.A.'s office. But this Court pointed out that the state court "made no mention" of that evidence. App. 44a. And Respondent attempts to rationalize what he acknowledges was the "seemingly insupportable determination" (Opp. 29) that Petitioner failed to establish even a *prima facie* case of racial discrimination

by contending that the state court mistakenly believed that it should take account of the prosecution's proffered justifications for its strikes at step one. But this blatant legal error hardly supplies a basis for confidence in the care with which the state court analyzed Petitioner's *Batson* claim.[1]

Finally, Respondent attempts to undermine one particularly powerful element of contextual evidence of racial animus, the fact that one of the two prosecutors in Petitioner's trial was found guilty of a *Batson* violation in another capital murder trial held at roughly the same time as Petitioner's trial, based on the same sorts of manipulations of the voir dire through disparate questioning as were present in Petitioner's case. App. 42a (citing *Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)). But Respondent's attempted rebuttals are either false or irrelevant. Contrary to Respondent's claims, the finding of a *Batson* violation in *Chambers was* before the state courts that reviewed the trial court's *Batson* decision in this case (Reply Br. 18 n.26, *Miller-El* v. *Cockrell*, No. 01-7662) and prosecutor Macaluso *was* the attorney who directed the State's entire voir dire in *Chambers*, *Miller-El* v. *Johnson*, No. 3:96-CV-1992-H (N.D. Tex. 2000), Amended Habeas Pet., Ex. 15, at 32.

B. The Court Disregarded The Jury Shuffle Evidence

This Court concluded that "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." App. 42a. That suspicion, this Court explained, "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." *Id.* This Court's concerns were "amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the ... District Attorney's Office

[1] Indeed, far from exculpating the trial court, this error is all the more damning because the court made it *after* the appellate court had expressly instructed that Petitioner *had* made out a *prima facie* case.

had, by its own admission, used this process" precisely "to manipulate the racial composition" of juries. *Id.*

Despite this Court's instruction that the jury shuffle evidence was relevant both to show the prosecution's discriminatory purpose and to call into question the adequacy of the state court's approach to the *Batson* evidence more generally, the Fifth Circuit utterly failed to take the jury shuffle evidence into account. The court's discussion of that evidence consists of two sentences. In the first, it offered the bafflingly irrelevant assertion that the defense also used jury shuffles. App. 10a. In the second, it conclusorily asserted that the evidence was insufficient to "overcome" the prosecution's "race-neutral reasons" for its peremptory challenges, which were "accepted by the state court who observed the *voir dire* process including the jury shuffles." *Id.*

Respondent offers neither an explanation nor a defense of the Fifth Circuit's dismissive handling of the jury shuffle evidence. Instead, apparently acknowledging the Fifth Circuit's failure to address that evidence, Respondent quickly asserts (Opp. 32), contrary to this Court's conclusion, that "in any event" the jury shuffle evidence does not really support an inference of discriminatory purpose. Respondent then hauls out two of the three patently pretextual rationalizations for the prosecutors' jury shuffle behavior that he used when this case was argued before this Court last Term. The first—that defense counsel's shuffle was not physically vigorous enough because many venire members simply moved from the front to back of the panel or vice versa—could hardly be a bona fide objection. The State's own shuffling resulted in just the same sort of clumping of jurors, but with African-Americans clustered near the back instead of the front. The second explanation, that the State made its objection before knowing the result of the shuffle, was expressly rejected by this Court, when it concluded that the genuine objection came only "after the new racial composition was revealed." App. 42a.

The undermining effect of the jury shuffle evidence on the credibility of the prosecution's pretensions to race neutrality is only strengthened by the State's pretextual ration-

alizations for that evidence. The Fifth Circuit has now had two opportunities, and the State has had three in briefs to this Court, to offer some plausible explanation that would weaken the inference of racially discriminatory intent that this Court found in that evidence. Yet both remain unable to do so. The jury shuffle constitutes important evidence that the prosecutors sought to exclude African-Americans from Petitioner's jury; the Fifth Circuit's persistent failure to acknowledge the force of that evidence requires correction.

C. The Court Failed To Give Proper Weight To Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans

When this Court last heard this case, it condemned "the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning." App. 40a. Yet on remand the Fifth Circuit did little more than restate that same discredited interpretation.

With respect to disparate questioning about the death penalty, the Fifth Circuit simply copied, *sometimes verbatim*, the arguments of this Court's lone dissent intended to show that the prosecutors' use of the "graphic script" was driven by venire members' ambivalence about the death penalty, not race. Those arguments fail, for at least three reasons. First, they depend on sheer speculation about the contents of 8 juror questionnaires that are not even in the record.[2] Second, the Fifth Circuit's and the State's speculation that those 8 venire members were ardent death penalty opponents conflicts with the State's own account that those jurors had simply "expressed reservations about the death penalty." Resp. Br. 18 & n.39, *Miller-El* v. *Cockrell*, No. 01-7662. The 10 blacks/10 whites comparison was based, as this Court noted, on "the State's . . . calculations." App. 41a. Third, the State's figures actually undercount by at least 8 the number of whites who expressed ambivalence about the

[2] Respondent's attack on Petitioner for failing to get the questionnaires made part of the habeas record is unfounded, but even if it were true, it would have no bearing on the impropriety of the court of appeals' decision simply to make up the contents of those questionnaires.

death penalty but did not face the graphic script. Thus, racial disparity in use of the graphic script was even greater than the court below acknowledged.[3]

Last Term, this Court noted that the evidence of disparate questioning about minimum sentencing—94% of whites told about the statutory minimum as compared to 12.4% of African-Americans—suggested "even greater disparity along racial lines" than the questioning about the death penalty and that the State offered "[n]o explanation . . . for the . . . disparity." App. 41a. Yet on remand, the Fifth Circuit baldly denied the existence of the disparity, stating that the prosecution "did not question venire members differently concerning their willingness to impose the minimum punishment." App. 21a. Respondent defends that position by repeating its contention (Opp. 26) that the prosecution withheld information about the statutory minimum only from venire members who had expressed views "unfavorable to the State." But this Court previously found that there were at least two whites (Mazza and Hearn) who "also expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but who admittedly were not subjected to this manipulative questioning. *Id.* at 40a; *see* Resp. Br. 19 & n.44, *Miller-El* v. *Cockrell*, No. 01-7662. And Respondent leaves unexplained the State's failure to use its manipulative script with the vast majority of whites who expressed reservations about the death penalty. App. 41a; Reply Br. 17 n.23, *Miller-El* v. *Cockrell*, No. 01-7662.[4]

[3] In addition to the 10 identified by the State, Mazza, Hearn, Vickery, Salsini, Duke, Sohner, Crowson, and Whaley expressed hesitancy. Two of those, Mazza and Hearn, served on the jury.

[4] Respondent asserts (Opp. 26)—without any citation to the record—that "almost all" whites who were opposed to the death penalty were removed before questioning about minimum punishments. But 34 whites did not face the manipulative script, at least some of whom (as Respondent's use of the word "almost" acknowledges) expressed opposition to the death penalty or were in some other way "unfavorable to the State."

It is also important to note that in its discussion of disparate questioning the Fifth Circuit never even mentioned a fact this Court found

In its preliminary analysis, this Court concluded that "[d]isparate questioning did occur" and that "a fair interpretation of the record . . . is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." App 40a, 42a. Nothing in the Fifth Circuit's decision, or in the State's defense of it, weakens those conclusions. Indeed the inaccurate rationalizations offered by Respondent for that racially disparate questioning only strengthen the inference that the State was bent on eliminating as many African-Americans as possible.

D. The Court Failed To Analyze The Treatment Of Similarly Situated Venire Members Properly

This Court determined that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." App. 39a. Yet on remand, the Fifth Circuit insisted to the contrary that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans. App. 11a. Even the limited space available suffices to demonstrate a few of the fundamental flaws in the Fifth Circuit's (and the State's) comparative juror analysis.

First, as a premise for juror comparisons, the court simply accepted the State's characterization of the struck African-Americans as overly ambivalent about the death penalty. For example, it accepted the view that Billie Jean Fields was struck because his "deeply held religious belief in the rehabilitative capacity of all persons" would make him hesitate to vote for the death penalty. App. 12a. Yet Fields was one of the most pro-death penalty members of the venire. He expressed unambiguous support for the death penalty on his questionnaire and then wrote "[i]f you commit the crime pay the pen[alt]y." JL 20. Although Fields believed that everyone can be rehabilitated, he made it clear that he

highly significant: that while petitioner's case was on direct appeal, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of questioning on mandatory minimums was employed by one of the same prosecutors who tried" Petitioner's case. App. 42a.

would vote for the death penalty *even* for someone who could be rehabilitated. JA 118-119. In his view, "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108. "In its extended service, the State represents Him if the crime has been committed and death is warranted." *Id.*

Second, when the Fifth Circuit compared struck African-Americans with unchallenged whites, it consistently overemphasized African-Americans' hesitancy about the death penalty, confidence in rehabilitation, or involvement with family members with criminal histories while downplaying those same traits in comparable whites. The court of appeals treated white juror Sandra Hearn as less ambivalent than Fields about the death penalty, for example, even though she expressly stated that her support for death *depended* on the defendant's prospect of rehabilitation.[5]

Similarly, the only reason given by the prosecution for striking African-American Edwin Rand was his uncertainty about imposing the death penalty. But his ambivalence was less pronounced than that of seated white jurors Hearn and Mazza. Rand wrote on his questionnaire that he supported the death penalty "depending on [the] crime." JL 36. Just like Rand, Mazza wrote on her questionnaire that her support for the death penalty "[d]epends on the crime." JL 148. After expressing some initial hesitation during voir dire, Rand confirmed his ability to vote for death, and indeed, said that he could impose death even for non-capital murder. When asked if she could impose the death penalty, Mazza responded, "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends . . . that would be something that I would feel like I could do. It's difficult." JA 519. Even the concurring and dissenting Justices last Term acknowledged the similarity between Rand and Hearn

[5] "I believe in the death penalty *if* a criminal cannot be rehabilitated and continue[s] to commit the same type of crime." JA 694 (emphasis added).

and Mazza. App. 49a, 59a. Yet the Fifth Circuit dismissed the similarity as not clear enough.

E. The Court Failed To Assess Whether The Trial Court's Judgment Was Entitled To Deference, And To Consider The Cumulative Weight Of The Evidence

Running through the court of appeals' mishandling of the various categories of evidence are two overarching errors of method: (i) a failure to assess critically how shortcomings in the state courts' reasoning undermined the deference to which state court judgments would otherwise be entitled and (ii) a failure to weigh the evidence of racially discriminatory purpose as a whole. This Court should correct those methodological errors so that other courts will not follow the Fifth Circuit's mistaken lead.

Again and again, the Fifth Circuit refrained from any independent analysis of the state court's finding of no racial discrimination. It endorsed the state court's handling of the historical evidence, although this Court had found that the state court did not even mention that evidence and had inexplicably held that Petitioner had failed to establish even a *prima facie* case. It dismissed the jury shuffle evidence because the trial judge had been present during the jury shuffles, although the *Batson* hearing in which that evidence was considered didn't take place until two years later and, "[a]s a result," this Court noted, "was subject to the usual risks of imprecision and distortion from the passage of time." App. 39a. It adopted the state court's determination that no disparate questioning had occurred, although this Court had reached just the opposite conclusion. It embraced the state court's comparative juror analysis, although this Court had found that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" (App. 39a) and it "accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial" (App. 38a) although this Court had cautioned it not to. Altogether, it treated the state court's finding of no discrimination as making the "credibility of the [prosecutors'] reasons . . . self-evident." App. 11a.

On habeas review, federal courts defer to state courts' factual findings. But deference must be informed by an assessment of the reasonableness of the state courts' methods of analysis. Blind acceptance, like that practiced by the Fifth Circuit, sets a precedent for turning deference into "abandonment or abdication of judicial review." App. 37a.

The Fifth Circuit also set a dangerous example by examining separately each type of evidence and asking whether it *alone* disproved the State's proffered race-neutral explanations. Considered in isolation, the fact that the prosecutors had been trained to exclude minorities from juries or that one of them had been found guilty of discriminatory jury selection at virtually the same time as Petitioner's trial were not enough to undermine the prosecutors' claims. The prosecutors' jury shuffle behavior, which has no explanation other than racial exclusion, was not enough alone to call their reasons into question. That the prosecutors deliberately engaged in two forms of manipulative and racially disparate questioning was not enough alone to discredit their reasons. And that they struck African-Americans who were no more unfavorable than a number of whites the prosecutors left unchallenged was not enough alone to undermine their pretensions to evenhandedness.

But the issue, as this Court had already explained, is not whether each piece of evidence considered in isolation suffices to "overcome" (App. 10a) the race-neutral reasons given by the prosecution. A single piece of evidence rarely does. The issue is whether the cumulative weight of all the evidence so erodes the prosecution's credibility that the prosecution's reasons become "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991). In this case, that cumulative weight was overwhelming.

CONCLUSION

For the foregoing reasons, as well as those presented in the Petition, the Court should issue a writ of certiorari.

Respectfully submitted.

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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUGLAS DRETKE,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE PETITION	4
A. The Fifth Circuit's Ruling Will Undermine the Public Reputation and Integrity of the Courts	4
B. The Fifth Circuit's Opinion Undermines the Court's Opinions in Both *Miller-El* and *Batson*	9
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Batson v. Kentucky, 476 U.S. 79 (1986) ... 2, 6, 9, 16, 17
Georgia v. McCullom, 505 U.S. 42 (1992) 4, 5
Hernandez v. New York, 500 U.S. 352 (1991) 12, 18
Hutto v. Davis, 454 U.S. 370 (1982) 9
Powers v. Ohio, 499 U.S. 400 (1991) 1, 5, 6
Purkett v. Elem, 514 U.S. 765 (1995) 12
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 16
Strickler v. Greene, 527 U.S. 263 (1999) 2, 9
Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 15

STATUTE

28 U.S.C. § 2254 ..... 3, 9

RULE

Sup. Ct. R. 10(a) 9

SCHOLARLY AUTHORITIES

Symposium, *Minnesota Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477 (1993) 5
Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 Litig. 14 (2004) 3
David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001) 5
George W. Dougherty et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny*, 37 Ga. L. Rev. 1021 (2003) 7, 8

TABLE OF AUTHORITIES—continued

Page

Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition, Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003) 7, 8, 9
Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285 (1999) 8
Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877 (1999) 8
William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 Hamline L. Rev. 235 (2002) 17
Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J.L. Reform 229 (1993) 5

OTHER AUTHORITIES

American Bar Ass'n, *Perceptions of the U.S. Justice System* (1999), *available at* http://www.abanet.org/media/perception/perceptions.pdf 6
Kevin Collison, *WNY Study Urges Increase in Ranks of Minority Jurors*, Buffalo News, Apr. 19, 2000, *available at* 2000 WL 5675310 4
The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001), *available at* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf 6

TABLE OF AUTHORITIES—continued

Page

National Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf 7

Pennsylvania Supreme Court Comm. on Racial and Gender Bias in the Justice Sys., *Final Report* (2003), *available at* http://www.courts.state.pa.ujs/Index/Supreme/Bias/FinalReport.pdf 4

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former judges and prosecutors, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. Plausible allegations of race discrimination in the courthouse itself severely discredit the administration of justice and diminish its authority. They must be scrupulously reviewed in order to preserve public confidence in the criminal justice system, to safeguard the democratic right of all citizens to be fairly considered for jury service, and to assure just and reliable outcomes for individuals facing loss of life or liberty through the criminal process.

Judges serve as the ultimate guardians of the judicial process. In general, "[t]he courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

For their part, prosecutors exercise their duties as officers of the court to enforce the criminal laws. This Court has repeatedly underscored "the special role" of the prosecutor to ensure that justice is done even at the expense of the legitimate prosecutorial interest in securing convictions.

---

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written with the assistance of Jessica Goneau, a student at the University of California School of Law (Boalt Hall). No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

Strickler v. Greene, 527 U.S. 263, 281 (1999). The prosecutorial function suffers when the criminal justice system operates in a discriminatory manner, including when peremptory challenges are used to exclude citizens from jury service based upon their race.

The question presented is critically important to the integrity of the trial process and to the effective administration of justice in a multiracial society. Members of the bench and law enforcement officials also bear responsibility for maintaining a justice system that honors the equal treatment of all persons and instills trust in the citizenry it serves, conditions that are necessary to the effective administration of justice.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT[3]

The Court's decision in *Miller-El* signaled its ongoing commitment to the promise of *Batson v. Kentucky*, 476 U.S. 79 (1986), through its detailed inspection of petitioner's "extensive evidence concerning the jury selection procedures" (Pet. App. 28a) and its insistence that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," nor does it preclude relief. *Id.* at 37a. As officers of the court, *amici* are concerned that too many citizens, particularly African Americans, believe that they do not receive equal treatment before the law and that juries are still unrepresentative. The public and law

[2] Two *amici* filed a brief in support of Thomas Miller-El's first petition for a writ of certiorari. *See* Brief of *Amici Curiae*, the Honorable Arlin M. Adams and Julie R. O'Sullivan ("*Amici* Cert. Brief"), *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) ("*Miller-El*"). Many of current *amici* then authored a brief on the merits. *See* Brief of *Amici Curiae*, Former Prosecutors and Judges, in Support of Petitioner, *Miller-El*, 537 U.S. 322 (2003).

[3] *Amici Curiae* adopt the facts and procedural history set forth in the petition for writ of *certiorari*.

enforcement community perceived this Court's earlier ruling in *Miller-El* as a highly visible reaffirmation of the Constitutional principles set forth in *Batson*. The public and law enforcement community are watching still, for *Miller-El* is now the leading case applying *Batson*.[4] Allowing the Fifth Circuit's ruling to stand would send a highly visible, detrimental signal that this Court has retreated from its clear ruling in *Miller-El*. *See* Pet. App. 3a.

Notwithstanding the Court's careful explication of how the third step of the *Batson* inquiry should be conducted by trial judges and by courts reviewing *Batson* claims under 28 U.S.C. § 2254(d)(2) & (e)(1), the Fifth Circuit rejected the majority's directives and adopted instead an illogically truncated framework for review. The result on remand is not a failure of evidence, but rather a failure of analysis.

Even within its own analytical framework, the Fifth Circuit could only reach the outcome it did by simply ignoring key aspects of petitioner's *prima facie* case. This Court, however, had highlighted those items of evidence as the source of some of its deepest concerns. For example, the Fifth Circuit ducks some of the most salient facts of all: stark racial disparity in the prosecution's use of its peremptory challenges and in its questioning of prospective jurors. As to those selective items of petitioner's evidence it does address, the Fifth Circuit omits crucial portions of that evidence (*e.g.*, that the prosecution's jury shuffling was done when the front of the panel contained a significant number of African Americans). *Amici* believe that a review of the totality of the evidence relied on by petitioner—conducted in the manner this Court prescribed in *Miller-El*—can lead to only one conclusion: the

[4] *See e.g.*, Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 Litig. 14, 15 (2004) (In *Miller-El*, "the Court reinforced *Batson*'s promise of equal protection in the selection of citizens to judge maters of profound interest to both the parties and the community").

prosecution intentionally used peremptory challenges to exclude African Americans from the trial jury.

Finally, the Fifth Circuit's opinion strikes at the very heart of judicial integrity. It undermines public confidence in the jury system and in the principle that redress of constitutional violations can be achieved through the process of judicial review. *Amici* urge the Court to exercise its supervisory power to enforce *Batson's* safeguards and ensure that lower courts conduct appropriate review of *Batson* claims. The Court should grant the petition for a writ of *certiorari* and grant relief to petitioner.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's Ruling Will Undermine the Public Reputation and Integrity of the Courts.

The diminished public confidence in the judicial system that results from discriminatory jury selection is of great concern to law enforcement. Prosecutors depend upon jurors to convict when the evidence warrants it. Moreover, where race is an issue or even *perceived* to be an issue in a case, it is essential that all ethnic groups in our diverse nation are satisfied that the verdict is the result of a fair process. *See Georgia v. McCullom*, 505 U.S. 42, 49 (1992). These important law enforcement interests will be harmed if the Court fails to stand firmly by its ruling in *Miller-El* and require that the lower courts follow its directions.

1. Nearly 20 years after *Batson* was decided and petitioner was tried and sentenced to death, race discrimination still has not been eradicated from the jury selection process. The persistent unconstitutional use of peremptory challenges has been demonstrated by empirical studies.[5] *Amici* share the

[5] *See, e.g.*, Kevin Collison, *WNY Study Urges Increase in Ranks of Minority Jurors*, Buffalo News, Apr. 19, 2000, at A1, *available at* 2000 WL 5675310; Pennsylvania Supreme Court Comm. on Racial and Gender Bias in the Justice Sys., *Final Report* 50-102 (2003), *available at* http://www. courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (racial and ethnic bias in jury selection, including a summary of findings in other states); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001); Symposium, *Minnesota Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477 (1993).

Court's view that the peremptory challenge plays a "significant role" in our trial process, but one which can and "must be accommodated to the command of racial neutrality." *Powers*, 499 U.S. at 415.[6]

Batson was cited in almost 1,000 state and federal appellate opinions during the past two years, a figure that only hints at the frequency with which challenges to discriminatory jury selection practices are made in the trial courts.[7] While the majority of *Batson* claims challenge the conduct of prosecutors, *Batson*'s rules apply to defense counsel as well, ensuring that neither party to a criminal case can exclude jurors based on their race. *See McCullom*, 505 U.S. at 54. A significant percentage of these *Batson* claims may ultimately be rejected. However, knowledge that our courts faithfully adhere to the rule of law in separating the meritorious from the frivolous is essential to maintaining public trust.[8]

[6] *See Amici* Cert. Brief at 9. *See also* Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J.L. Reform 229, 274-75 (1993).

[7] A LEXIS search was performed on May 3, 2004, using the search term "Batson w/3 Kentucky," and restricting cases to the previous two years. The search was performed in the file "federal & state cases, combined." A LEXIS search using the same search parameters performed for 2001 found 440 state and federal court appellate decisions citing *Batson*. *See Amici* Cert. Brief at 2 & n.3. In short, there is no decline in the number of cases in which *Batson* is the subject of appellate review.

[8] In their brief in support of Mr. Miller-El's first petition for a writ of *certiorari*, *amici* surveyed cases over a two-year period in one state within the Fifth Circuit, Louisiana, in which prosecutors had used their peremptory challenges to strike most, if not all, African Americans from the jury. *See Amici* Cert. Brief at 9.

In May 2000, a blue-ribbon committee, including both supporters and opponents of the death penalty, examined the administration of our capital punishment system and "recommend[ed] ways to ensure that fundamental fairness is guaranteed for all." The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* ix (2001), *available at* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf. It sought to address "the potential for racial discrimination [that] hang[s] over our nation's capital punishment system." *Id.* at 23. The committee made clear the need for "vigorously enforcing *Batson v. Kentucky*" "to ensure that racial minorities are part of every decision-making process within the criminal justice system." *Id.* at 24.

2. According to an American Bar Association survey, the public's continued support for our justice system stems from its trust in the role of the jury.[9] This understanding of the significance of the jury as an institution derives in part from the decision in *Batson*, which recognized that the jury occupies a "central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)); *see also Powers*, 499 U.S. at 411. By compromising the representative quality of the jury, racially discriminatory selection procedures undermine this critical safeguard. *See Batson*, 476 U.S. at 86 n.8. Beyond the injury to the fair trial process, the harm from discriminatory jury selection touches the excluded jurors and the entire community. *Id.* at 87; *see also Powers*, 499 U.S. at 406-07. Apart from voting, for most citizens, jury service represents "their most significant opportunity to participate in the democratic process." *Id.* at

[9] American Bar Ass'n, *Perceptions of the U.S. Justice System* 6-7 (1999), *avaiable at* http://www.abanet.org/media/perception/perceptions.pdf. Seventy-eight percent of respondents believe that the jury system is the fairest way to determine guilt or innocence, and sixty-nine percent believe that juries are the most important aspect of our justice system. *Id.*

407. In significant numbers, persons of color, particularly African Americans, believe that they are not accorded equality before the law and view juries as unrepresentative.[10] However, the opportunity to participate in the administration of justice through jury service significantly increases trust in the fairness of the justice system.[11] Moreover, jury verdicts are most likely to be accepted by the public when they are the product of a diverse jury that is fairly selected.[12]

A recent study concerning public trust and confidence in the Georgia court system was conducted at the request of the Georgia Supreme Court.[13] The research was prompted by a 1999 survey undertaken by the National Center for State Courts, which examined public attitudes toward the judicial system and revealed that African Americans and Hispanics were more likely than whites to agree that "[m]ost juries are *not* representative of the community" (emphasis added).[14] The Georgia Public Trust and Confidence Survey focused on "issues raised by *Batson* and its progeny."[15] It also asked respondents whether most juries are not representative of the community. The Georgia study found that, whether or not they had served as jurors, a majority of whites agreed with the

[10] National Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* 29-32, 37-38 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf ("*How the Public Views the State Courts*").

[11] George W. Dougherty et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny*, 37 Ga. L. Rev. 1021, 1030-32 (2003) ("*Georgia Public Trust and Confidence Survey*").

[12] *See, e.g.*, Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition, Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003) ("*Race, Diversity and Jury Composition*").

[13] *See Georgia Public Trust and Confidence Survey, supra*, at 1021.

[14] *See How the Public Views the State Courts, supra*, at 7, 29.

[15] *See Georgia Public Trust and Confidence Survey, supra*, at 1022.

statement (57.3 percent compared to 53.5 percent). However, 66 percent of African Americans who had no prior jury service agreed compared to 46.7 percent of those who had sat as jurors.[16]

Rigorous, steadfast enforcement of the Court's *Batson* jurisprudence is critical to integrity of the jury system and to the public's acceptance of jury verdicts. *Amici* believe that *Batson* offers the most effective, long-term safeguard against jury nullification as well as a vital means of ensuring public confidence in the verdict when there is a conviction.[17] A survey of jury-eligible individuals found that when the jury was diverse, the verdict—conviction or acquittal—did not influence perceptions of the trial's fairness.[18] However, when the jury did not include minority members, observers viewed the trial as less fair if it produced a guilty verdict.[19] National conviction rates are close to 90 percent.[20] "If the racial composition of a jury is more likely to affect perceptions of the fairness of the trial procedure when the trial results in a conviction, jury composition will be an important factor [in reinforcing perceptions of fairness] in a majority of criminal trials."[21]

Taken together, these results affirm that jury service tends to improve public perception of the courts. The statistically

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[16] *Id.* at 1033.

[17] *See e.g.*, Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285, 316 (1999); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 937 (1999).

[18] *Race, Diversity and Jury Composition*, *supra*, at 1049.

[19] *Id.*

[20] *Id.* at 1049-50 & n.43 (citing Carol J. DeFrances & Greg W. Steadman, Bureau of Justice Statistics Bull., *Prosecutors in State Courts, 1996*, at 5 (1998)).

[21] *Id.* at 1050.

significant differences between African Americans who have served as jurors and those who have not provides evidence to support the Court's concern in *Batson* that excluding African Americans from juries undermines perceptions of fairness in our system of justice.[22] This perception of fairness, in turn, is critical to ensuring both that jurors perform their sworn duties with dispassionate fairness, based only on the law and the facts, and that their judgments are accepted by the public.

Furthermore, the Court must ensure that there are sanctions whenever any party engages in intentional discrimination in jury selection. *Strickler v. Greene*, 527 U.S. at 281 (the goals of the criminal justice system are not met when a guilty man is convicted by constitutionally improper means). Failure to enforce this rule will severely undermine public confidence in the integrity of the judicial process as a forum in which constitutional violations are vindicated. No participants in the justice system, including judges and prosecutors, are served by that outcome.

B. The Fifth Circuit's Opinion Undermines the Court's Opinions in Both *Miller-El* and *Batson*.

"[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). The Fifth Circuit's departure from the Court's opinion in *Miller-El* and the Court's explication of the proper steps of analysis in *Batson* warrants the Court's intervention and review pursuant to its supervisory authority. Sup. Ct. R. 10 (a).

In *Miller-El*, the Court directed the Fifth Circuit to undertake a review of petitioner's *Batson* claim under the provisions of 28 U.S.C. § 2254(d)(2) & (e)(1). Pet. App. 38a. Addressing the proper standard for review under § 2254(d)(2)

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[22] *Id.* at 1044-45. *See Batson*, 476 U.S. at 87.

& (e)(1), the Court cautioned that "deference does not imply abandonment or abdication of judicial review." *Id.* at 37a. It underscored that the statutory constraints of the Antiterrorism and Effective Death Penalty Act ("AEDPA") "do[] not by definition preclude relief," and that "[a] federal court can disagree with a state court's credibility determination" under either or both subsections of § 2254. *Id.*

The only issue on remand was step three of the *Batson* inquiry. Pet. App. 35a. The Fifth Circuit's insistence on "too demanding a standard" for the granting of a COA and its failure to "give full consideration to the substantial evidence petitioner put forth in support of the prima facie case" led the Court to furnish a blueprint for deciding the merits of petitioner's claim. *Id.* at 38a.

In providing this blueprint, the Court "explain[ed] in some detail the extensive evidence concerning the jury selection procedures [during petitioner's trial]," which consisted both of facts "relating to a pattern and practice of race discrimination in the *voir dire*" and evidence "directly related to the conduct of the prosecutors in his case." Pet. App. 28a. The Court characterized its review of the evidence as a "preliminary, though not definitive, consideration of the three-step framework mandated by *Batson*" for the purpose of determining whether a COA should have issued. *Id.* at 35a. This preliminary consideration examined the evidence with a focus upon the third step of the *Batson* inquiry, when the "critical question" is "the persuasiveness of the prosecutor's justification for his peremptory strike." *Id.*

1. The Fifth Circuit's opinion on remand undid entirely the Court's analytical framework by declaring that "it is important to identify the prosecution's stated reasons for exercising a peremptory challenge. *Once we have identified the reasons for the strikes, the credibility of the reasons is*

self-evident." Pet. App. 10a-11a (emphasis added).[23] The entirety of the Fifth Circuit's opinion simply begs the very question that this Court expressly declared it should consider, and should consider with some care in light of petitioner's weighty evidence. In its opinion, this Court criticized both the district court and the Fifth Circuit for failing to "give full consideration to the substantial evidence petitioner put forth in support of the prima facie case." *Id.* at 38a. The Fifth Circuit not only has repeated that error, but has done so in a manner that will compound its error in future cases.

The Fifth Circuit has created a tautological framework for review of *Batson* challenges. At step three of a *Batson* inquiry, as this Court noted, "the trial court must determine whether the defendant has shown purposeful discrimination." Pet. App. 25a-26a. Obviously, the credibility of any facially neutral reason for a challenged strike lies at the very heart of determining whether that reason was in fact pretexual and whether there was purposeful discrimination. "[T]he issue [in the third step] comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Id.* at 35a. Early in its opinion, the Fifth Circuit declared that it is undisputed "that the prosecution presented facially race-neutral reasons for exercising each peremptory challenge." *Id.* at 7a. Having subsequently declared those reasons, once divined by the court, to be "self-evident[ly]" credible (*id.* at 11a), it will always be true that anytime a race-neutral explanation is proffered in response to a *Batson* challenge, the results of the third step will favor the non-moving party as

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[23] Of course, a trial court's credibility findings are entitled to deference, and should be upheld unless clearly erroneous, and, in the context of habeas, unreasonable in light of the evidence presented. But this is not what the Fifth Circuit said or did in this case. To say that a reason is "self-evident[ly]" credible (Pet. App. 11a) is to *decide* the credibility question rather than, as this Court expressly ordered, engaging in further analysis to determine whether the prosecution's explanations were in fact credible in light of the totality of petitioner's evidence. *See id.* at 35a.

long as the explanation is not facially preposterous. Such a framework makes the third step of *Batson* meaningless. Unless the non-moving party fails to proffer any facially neutral reason at step two, it will survive the challenge.

In driving to this result, however, the Fifth Circuit did not create a rule for only this case. That facially neutral reasons are *self-evidently* credible, once identified by an appellate court, is a rule that courts in the Fifth Circuit will apply to other cases. This rule converts *Batson*'s three steps into two. Following the Fifth Circuit's model, courts would accept race-neutral explanations shorn of their full context and could not, consistent with the demands of the Equal Protection Clause, determine whether the proponent had met his ultimate burden of persuasion. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). The Fifth Circuit's approach thus gives "deference" a meaning neither sanctioned by this Court nor tolerable under § 2254.

Despite its fatal logical flaw, this rule is a powerful and seductive tool. The Fifth Circuit's own analysis demonstrates how this is so. The Court measured some (but, importantly, not all) of petitioner's evidence against what it viewed to be self-evidently credible racially neutral justifications for the strikes. Unsurprisingly, petitioner's evidence did not overcome this dispositive characterization of the neutral reasons proffered by the prosecutors. *No* amount of evidence of purposeful discrimination—short of direct evidence that the proffered reasons were lies—could overcome a prior determination that the proffered neutral reasons are credible and therefore innocent in their intent. Because the Fifth Circuit not only ignored the Court's carefully constructed analytical framework for assessing claims like petitioner's, but also created a rule that fundamentally departs from this Court's precedents in *Purkett*, *Hernandez v. New York*,[24] and *Batson* itself, *certiorari* is warranted.

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[24] 500 U.S. 352 (1991) (plurality opinion).

2. The Fifth Circuit's consideration of petitioner's evidence, as cursory as it may have been, itself so far departed from this Court's "preliminary … consideration" of petitioner's prima facie case that review is warranted for this reason as well. Pet. App. 35a. The Fifth Circuit fails entirely to address central points that this Court made regarding reasonable inferences of purposeful discrimination that follow from certain specific evidence adduced by petitioner. Where it does address evidence presented by petitioner, the Fifth Circuit offers perfunctory and incomplete analyses that only serve to highlight further the flaw in its own analytical framework. In sum, the court of appeals paid no more than lip service to the requirement in making the credibility determination that there must be a collective evaluation of the "facts and circumstances that were adduced in support of the prima facie case." *Id.* at 37a.

a. Remarkably, the Fifth Circuit did not once acknowledge that prosecutors used peremptory strikes to remove 91 percent of the eligible African American prospective jurors and only 13 percent of the white jurors. This particular piece of evidence is significant in two respects: (1) it is powerful circumstantial evidence of discriminatory intent; and (2) this Court itself took note and concluded that "[h]appenstance is unlikely to produce this disparity." Pet. App. 28a, 39a.

Further, the Fifth Circuit disregarded specific conclusions drawn by this Court—readily apparent from the COA inquiry—that "[d]isparate questioning did occur" and that the manipulative questioning regarding the minimum punishment for murder was almost exclusively directed at African Americans who expressed ambivalence about the death penalty. Pet. App. 40a-42a. Rather than conduct its own analysis, the Fifth Circuit adopted, sometimes *verbatim* and always without attribution, the State's arguments and the

dissenting opinion in *Miller-El*. Pet. 16, 17, 19, 21.[25] In doing so, it also borrowed the notion from the dissenting Justice in *Miller-El*,[26] which was clearly rejected by this Court, that when a prosecutor's reasoning is absent from the record, it may be supplied by hypothesis.[27] For example, the Fifth Circuit, adopting the rationale of the dissent in *Miller-El*, presumed that disparate questioning about the death penalty was justified based upon the differences in jurors' answers on their questionnaires despite the fact that the questionnaires of most of the white jurors were not part of the record. Pet. App. 19a-20a. *See also id.* at 61a-62a (Thomas J., dissenting); Pet. 17 & n.2. Likewise, the Fifth Circuit improperly dismissed circumstantial evidence in adressing the issue of disparate questioning, departing again from this Court's guidance in *Miller-El* that "'under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."'" Pet. App. 42a (quoting *Batson*, 476 U.S. at 93).

Finally, the Fifth Circuit declined to follow even the test set forth by this Court for answering the central question on remand, the persuasiveness of the prosecutors' justification

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[25] Significant portions of the Fifth Circuit's opinion are unattributed, verbatim passages of the State's briefs below and the dissent in *Miller-El*. *Compare* Pet. App. 11a-18a, *with* Brief of Appellee (on remand) at 6-13, 16-18, *and* Brief of Respondent at 3-8, 11-12, *Miller-El*, 537 U.S. 322 (2003); *compare* Pet. App. 19a-21a, *with id.* at 61a-64a (Thomas, J., dissenting).

[26] Pet. App. 19a-20a.

[27] In discussing the prosecution's disparate questioning of black and white jurors, the Court found that "[n]o explanation is proffered for the statistical disparity" and, further, that had evidence be available to refute petitioner's assertion, "'it cannot be assumed that the [prosecution] would have refrained from introducing it'" Pet. App. 41a-42a (quoting *Norris v. Alabama*, 294 U.S. 587, 594-95 (1935)).

for their peremptory strikes. Pet. App. 35a. The Fifth Circuit said nothing about the test for assessing credibility. It said nothing about whether the reasons proffered by the prosecutors were probable or improbable (the latter warranting less weight and greater scrutiny). *Id.* And it said nothing about whether the proffered reasons had "some basis in accepted trial strategy." *Id.* This degree of departure from the Court's opinion, however, necessarily follows from the Fifth Circuit's development of its own analytical framework in which the credibility determination is self-evident and not open to question.

b. In *Miller-El*, the Court criticized the state courts' failure to consider the historical evidence at step one and their conclusion that "there was not even the inference of discrimination to support a prima facie case." Pet. App. 44a. On remand, the Fifth Circuit declared that "the relevancy of this evidence is less significant [at step three] because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." *Id.* at 9a-10a. But this attempt to diminish the weight of Miller-El's "historical" evidence fails for two reasons. First, the Fifth Circuit thereby disregarded the directive in *Miller-El* that this historical evidence, which "casts doubt on the legitimacy of the motives underlying the State's actions" (*id.* at 43a) be part of the ultimate calculus "[i]n resolving the equal protection claim." *Id.* at 44a. Even if this historical evidence were only "circumstantial," that would not diminish its relevance to the issue of whether the proffered justifications were pretextual. This Court has never held that circumstantial evidence of discrimination is any less probative than direct evidence in conducting the step three analysis. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (courts must inquire into "such circumstantial and direct evidence of intent as may be available"). In sum, the court below turned *Batson* on its head by concluding that the more powerful the prima facie case, the less relevant the

evidence supporting the prima facie case is to the final inquiry.

Second, the historical evidence *was* inextricably intertwined with the conduct of the prosecutors in selecting the jury at petitioner's trial. *Both* of petitioner's prosecutors had been members of the District Attorney's Office when that agency formally trained its lawyers to exclude minorities from jury service, and one of the prosecutors had been found by a Texas appellate court to have engaged in race-based jury selection in another capital trial. Pet. App. 42a-43a. This crucial aspect of petitioner's historical evidence led to this Court's "supposition that race was a factor" in the prosecution's jury selection methods. *Id.* Yet, the Fifth Circuit ignored this evidence entirely in its opinion.

The Fifth Circuit also gave painfully short shrift to evidence concerning the Texas practice of "jury shuffles," noting only that defense counsel had requested more shuffles than the State. Pet. App. 10a. In the absence of any other evidence, the fact that defense counsel also shuffled the jury might indeed indicate that the prosecutors having done so was not out of the ordinary. But, again, this disregards entirely this Court's conclusion that the manner and timing of the prosecution's decisions to seek a jury shuffle "tend[] to erode the credibility" of the state. *Id.* at 42a. That is because the prosecution's shuffles occurred when there were African Americans seated in the front of the panel. *Id.* Prosecutors also waited to object to defense shuffles until the results of those shuffles, in terms of racial composition, became apparent. *Id.* The Fifth Circuit's approach to the evidence of jury shuffles exemplifies how it repeatedly Balkanized petitioner's evidence, taking selective items of proof in isolation, and failed to consider "all relevant circumstances" at step three. *Batson*, 476 U.S. at 93, 96-97.[28]

[28] *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (noting that the fact finder, in deciding the ultimate question of discrimination, may consider the plaintiff's prima facie case "'and inferences properly drawn therefrom'").

The logical flaws in the Fifth Circuit's analysis and its repeated failures even to address problematic evidence that was highlighted in this Court's opinion demonstrate that the State fails at the *Batson*'s third step. This Court found that disparate questioning of jurors regarding their views on the death penalty did occur and that "the differences in questions posed by the prosecutors are some evidence of purposeful discrimination." Pet. App. 40a-41a. When coupled with the evidence regarding the racial disparity in the strikes exercised by the prosecution and the evidence of jury shuffles, the prosecutors' generalized, post-hoc race-neutral justifications are overborne by petitioner's much more specific evidence. Standing alone, this evidence is sufficient to show that the state court's original findings were clearly erroneous. The historical evidence, and the connection of that historical evidence to this case, makes that conclusion unassailable.

3. While this case is a benchmark, the nature of the benchmark remains undetermined. Left as precedent, the Fifth Circuit's revision of the *Batson* inquiry would insulate invidious discrimination by "'those ... of a mind to discriminate,'" *Batson*, 476 U.S. at 96, by relieving judges—whether at trial, on direct or collateral review—of the duty to engage in an analysis of the totality of the evidence at the step three. Given the numerous possible grounds for challenging a juror, race-neutral explanations for exercising strikes are not difficult to invent.[29] *Unless these explanations can be tested against the weight of all the prima facie evidence*, it becomes

[29] William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice Sys.*, 25 Hamline L. Rev. 235, 266 (2002) (noting that acceptable race-neutral reasons for striking a minority juror include living in the same neighborhood as the defendant, living in a large city, being new to the neighborhood, involvement in the criminal or juvenile justice system, answering questions too quickly, being young and inexperienced, being a foster care worker, or knowing a state witness twelve years prior to trial).

impossible to "erode the credibility of the [opponent's] assertion" sufficient to carry the ultimate burden of persuasion. Pet. App. 42a; *see also Hernandez*, 500 U.S. at 369 (plurality opinion). The result, exemplified by the outcome on remand, is that meritorious *Batson* challenges become a futile exercise.

Given the overwhelming nature of petitioner's evidence and this Court's opinion reviewing that evidence in the context of the COA, *amici*'s greatest concern lies with the damage that the Fifth Circuit's decision (and petitioner's potential execution resulting therefrom) will inevitably do to the public reputation and integrity of our court system. Judges and prosecutors must each day contend with a public that only tentatively places its trust in our judicial system. A decision like the Fifth Circuit's will have a negative effect on the day-in and day-out activities of our colleagues charged with making this system work.

Federal judicial review on habeas should be conducted only within the parameters of the relevant statutory and constitutional limitations. But if the public is to have confidence in the prosecutorial and judicial functions, that review must take place. The intended outcome is that only exceptional cases will meet the stringent test for relief under the AEDPA. However, public confidence cannot be maintained when federal courts decline to grant relief when, as here, it is clearly warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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APPENDIX

APPENDIX

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Beth A. Wilkinson formerly served as an Assistant United States Attorney for the Eastern District of New York from 1991 until 1995, Counsel to the Deputy Attorney General in 1995, and as a Special Attorney to the U.S. Attorney General for *United States v. McVeigh* from 1996 until 1998. She is currently the Co-Chairman of the Constitution Project's Death Penalty Initiative and a partner in the law firm Latham & Watkins in Washington, D.C.

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IN THE
Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LEAGUE OF WOMEN VOTERS OF THE UNITED STATES and COMMON CAUSE, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 3

ARGUMENT 5

I. The Panel's Reasons For Dismissing the "Historical" Evidence Of Discrimination Deprive History Of Its Proper Probative Weight In *Batson* Analysis And Should Be Disapproved By This Court 5

A. The Panel Below Discounted the Historical Evidence For Indefensible Reasons, Including An Unwarranted Degree Of Deference To The State Court's Slighting Consideration Of It 7

B. The Panel Disregarded Historical Evidence That Is Critical In Evaluating The Prosecutors' Assertions That Their Strikes Were Not Discriminatory 10

II. The Panel's Evaluation Of the Evidence In This Case Flouts This Court's Intentions in *Batson* And Perpetuates The Discrimination The Court Sought To End 11

TABLE OF CONTENTS (continued)

Page

Conclusion 17

Table of Authorities

Cases:

Alexander v. Louisiana,
405 U.S. 625 (1972) 1

Avery v. Georgia,
345 U.S. 559, 562 (1953) 11

Batson v. Kentucky,
476 U.S. 79 (1986) ..... *passim*

Carter v. Jury Commission,
396 U.S. 320 (1970) 1

Chambers v. State,
784 S.W.2d 29 (Tex. Crim. App. 1989) 13

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 1

Georgia v. McCollum,
505 U.S. 42 (1992) 1

Ham v. South Carolina,
409 U.S. 524 (1973) 1

Table of Authorities (continued)

Page

Cases (continued):

Hill v. Texas,
316 U.S. 400 (1942) 7

J.E.B. v. Alabama ex. rel. T.B.,
511 U.S. 127 (1994) 2

Johnson v. California,
540 U.S. ___ (2004) 1

Miller-El v. Cockrell,
537 U.S. 322 (2003) ..... *passim*

Miller-El v. Dretke,
361 F.3d 849 (5th Cir. 2004) ..... *passim*

Miller-El v. State,
748 S.W.2d 459 (1988) 9

Miller-El (Dorothy Jean) v. State,
790 S.W.2d 351 (Tex. App. - Dallas 1990) 13

Neal v. Delaware,
103 U.S. 370 (1880) 12

Norris v. Alabama,
294 U.S. 587 (1935) 12

Powers v. Ohio,
499 U.S. 400 (1991) 18

Table of Authorities (continued)

Page

Cases (continued):

Purkett v. Elem,
514 U.S. 765 (1995) 17

Robinson v. State,
773 So.2d 943, 949 (Miss. App. 2000) 17

Swain v. Alabama,
380 U.S. 202 (1965) 1, 11, 12

Turner v. Fouche,
396 U.S. 346 (1970) 1

Other Authorities

Ed Timms & Steve McGonigle,
A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases,
DALLAS MORNING NEWS, Dec. 21, 1986 ..... 13, 14

Steve McGonigle,
Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds, DALLAS MORNING NEWS,
March 9, 1986 14

Interest of *Amici Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Johnson v. California*, 540 U.S. ___ (2004), and in the prior proceedings in this case, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in one thousand

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

communities and in every state, with more than 120,000 members and supporters nationwide.

Founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States, the League has always worked to promote the values and processes of representative government. Working for open, accountable, and responsive government at every level; assuring citizen participation; and protecting individual liberties established by the Constitution — all reflect the deeply held convictions of the League of Women Voters.

The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens. Racial discrimination to block citizen participation in government offends the core values of the League and the American system of representative government. We believe that no person should suffer the effects of legal or administrative discrimination. The League participated as *amicus curiae* in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), the case that prohibited the exercise of peremptory challenges based on the gender of the juror, and in the earlier proceedings here, *Miller-El*, 537 U.S. 322.

Common Cause, Inc. was founded in 1970 as a nonpartisan advocacy organization that seeks to further the public interest. Common Cause has 250,000 members and supporters across the country and has organizations in 38 states, with a national office in Washington, DC.

Common Cause has worked throughout its 34-year history to ensure that the processes of government in all three branches are fair, open, and accountable to the public. It believes that racial discrimination in the selection of a jury, one of the fundamental processes of government, undermines our system of justice and, more broadly, the underpinnings of our democratic form of government.

Amici submit that their perspectives on the broad systemic and governmental implications of racial discrimination in jury selection differ from the immediate concerns of the parties and will be valuable to the Court in appraising the issues presented.

Introduction and Summary of Argument

Amici urge the Court both to grant *certiorari* in this case, and also ultimately to grant Miller-El relief in his favor.

Batson v. Kentucky and this Court's earlier decision in the present case, *Miller-El v. Cockrell*, required courts to give genuine attention to cleansing the criminal justice process of the taint of racial discrimination in jury selection. The response of the Fifth Circuit panel on remand in this matter, however, was to articulate new formulas — hardly differentiable from the old ones that this Court condemned — that excused patent race-based exclusion of an entire group of citizens from jury service.

The decision below constitutes a dangerous precedent that can only invite cynicism and disrespect for the law. Despite clear guidance from this Court about the relevance of Miller-El's evidence of discrimination and the proper way of analyzing it, the court below conducted an analysis that dismisses, miscasts, and minimizes that evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone, proves discrimination.

The result is that the panel dismissed proof of discrimination which can be characterized only as ***undeniable***. The historic and continuing racially biased jury-packing behavior of the prosecutors in Miller-El's case was not at all subtle or discreet; it was open and notorious. Despite this Court's explicit directive to consider it, the panel substituted a

curt dismissal of that history as inconsequential for its earlier view that it was irrelevant.[2] As wrong as this was in Miller-El's case, it also signals the failure of the panel to comprehend this Court's determination to end racial bias in jury selection. The only way to put the history of racial discrimination in criminal justice behind us in this country is to acknowledge its reality and remedy its wrongs insofar as those remain correctable, not to write it off as insignificant.

Amici urge this Court to grant review and to reverse the decision below, which perpetuates racial discrimination by turning a blind eye to its manifest reality. Racial discrimination in the selection of juries injures not only the defendant and the African-American (or other) citizens who are excluded from service, but the entire community and the very authority of government. Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. If courts condone glaring racial

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[2] "The Supreme Court stated that proof 'that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection' is 'relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions' in Miller- El's case. *Miller-El,* 537 U.S. at 347 . . . . In this case, however, the relevancy of this evidence is less significant because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case. This historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however, as explained below the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect." *Miller-El v. Dretke*, 361 F.3d 849, 855 (5th Cir. 2004).

discrimination in the courtroom, they teach the inevitable lesson that law is insincere or inept in its repeated avowals to afford equal justice to all.

When citizens of a defendant's race are disproportionately excluded from serving on his jury by the government officials prosecuting him, a legitimate perception of injustice arises. That perception cannot be dispelled by a perfunctory judicial review of his complaint of discrimination that inquires merely — as the panel did below — whether the prosecutors' articulated justifications for excluding each individual minority juror, viewed out of context, are plausible. A more critical examination of the prosecutors' actions, which considers all probative information about the circumstances of their exclusionary behavior and the record of the actors engaging in it, is essential. This Court said as much in Miller-El's case last Term, and it should grant review again to make clear that it meant what it said.

The proof of racial discrimination in this case is as strong as courts are ever likely to see. *Amici* urge the Court to send an unequivocal message to the lower courts that such discrimination violates *Batson* and will not be tolerated.

ARGUMENT

I. THE PANEL'S REASONS FOR DISMISSING THE "HISTORICAL" EVIDENCE OF DISCRIMINATION DEPRIVE HISTORY OF ITS PROPER PROBATIVE WEIGHT IN *BATSON* ANALYSIS AND SHOULD BE DISAPPROVED BY THIS COURT

At his capital trial in 1986, Miller-El objected to the prosecution's use of peremptory strikes "to exclude 10 of the 11 African-Americans eligible to serve" on his jury. *Miller-El*, 537 U.S. at 326. As this Court held, and as the State does not contest, "[a] comparative analysis of the venire demonstrates that African-Americans were excluded from petitioner's jury in

a ratio significantly higher than Caucasians were." *Id.* at 331. The prosecution used its peremptory strikes to exclude 91% of eligible African-Americans from Miller-El's jury, compared to 13% of eligible non-African Americans. *Id.* As this Court recognized last year, "[h]appenstance is unlikely to produce this disparity," *id.* at 342.

The issue to be determined by the state trial court under *Batson v. Kentucky*, 476 U.S. 79 (1986), was whether this disproportionate exclusion of African-Americans was race-based and therefore discriminatory or was the coincidental result of other factors. At a pre-trial hearing and again at a post-trial *Batson* remand hearing, Miller-El presented "extensive evidence" in support of his claim that the prosecutors' strikes were discriminatory. *Miller-El*, 537 U.S. at 328. The credibility of the prosecutors' race-neutral explanations for their strikes had to be assessed in light of all these "facts and circumstances," including those presented in support of a *prima facie* case. *Id.* at 340. Since the trial judge expressed doubt about the relevance of any evidence beyond the *voir dire* itself and never discussed any other evidence in reaching his decision,[3] *id.* at 329, it is highly unlikely that such evidence entered into his decision-making.

In *habeas* proceedings, although deference is due to the trial court's findings, "a federal court can disagree with a state court's credibility determination and . . . conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 537 U.S. at 340. Here, as this Court recognized, "the culture of the District

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[3] The state trial judge admitted the evidence "in an abundance of caution" but made clear that he was not required to give it any weight whatsoever in his decision. *See Joint Appendix* in *Miller-El v. Cockrell* at 844 (hereinafter "J.A."). His written decision recites the evidence he considered — the "raw numbers" of strikes used; the "entire voir dire process" and "the explanations for the [strikes] . . . offered at trial and at the retrospective *Batson* hearing." J.A. at 876. The pattern and practice evidence is omitted from the list, and not mentioned anywhere else.

Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Id.* at 347. To ignore that ugly chapter of history does not erase it, but perpetuates it, creating the risk that it will be repeated as prosecutors realize that courts will not grant defendants relief from such misconduct. Yet the Court of Appeals on remand brushed the historical evidence aside through reasoning that would render such evidence of no avail in any case (see *infra* § I.A.) and despite its strong probative force (see *infra* § I.B). Had it given the historical evidence proper consideration, it would have been compelled to reach a different result — a holding that the prosecutors' strikes were based on race (see *infra* § II).

Despite its duty to do so, the court below never examined the extensive evidence submitted by Petitioner outside the facts of the trial itself to determine what light it might shed on the prosecutors' assertions that they had not discriminated. Its reasoning for dismissing the evidence is fundamentally unsound. An analysis which *includes* the evidence would have reached a different result — a holding that the prosecutors' strikes were based on race.

A. The Panel Below Discounted The Historical Evidence For Indefensible Reasons, Including An Unwarranted Degree Of Deference To The State Court's Slighting Consideration Of It

It should be noted at the outset that although the history of excluding African-Americans from jury service in Dallas extends back many generations before Miller-El's trial, (*see, e.g., Hill v. Texas*, 316 U.S. 400 (1942)), the "historical" evidence of discrimination presented by Miller-El extended up through the time of his trial and beyond. The powerful testimonial and statistical proof of a pattern and practice of discrimination included the five-year period immediately before Miller-El's trial. (See *infra* pp. 13-14). This was not ancient history. The "historical" evidence related to the policy and practice of the office prosecuting Miller-El during the period of

time when the particular prosecutors in his case were being trained and trying cases, and when Miller-El himself was tried.

The court below dismissed this evidence on grounds that make federal judicial enforcement of *Batson* virtually an illusion. First, although it acknowledged that in theory "historical evidence is relevant to the extent that it *could* undermine the credibility of the prosecutors' race-neutral reasons" for peremptory strikes, 361 F.3d at 855 (emphasis supplied), it never considered whether the historical evidence actually *does* undermine the prosecutors' credibility in this case. Rather, upon finding that "the race-neutral reasons [proffered by the prosecutors] are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty," *id.*, the panel treated these findings as obviating any need to determine whether the purported race-neutral reasons were pretextual in light of all of the evidence.

In other words, if prosecutors — even those trained and accustomed to accomplishing racial discrimination in precisely this fashion — have sufficient ingenuity to develop "solid" arguments to support their explanation for peremptorily challenging a venireperson, and if the explanation "accord[s]" with some legitimate prosecutorial aim in jury selection, there is no necessity for reviewing courts to consider other evidence that might undermine the credibility of the explanation thus "supported," even when that other evidence was ignored entirely by the trial court, *see supra* note 3. This first ground for the holding below is akin to saying that "The prosecutor has produced some solid evidence that his motives are as he professes. We need not consider any evidence that they are not, because we already have evidence that they are."

Second, the court below reasoned that, because the trial judge "heard" the historical evidence and still found the prosecutors' race-neutral reasons to be "genuine," that evidence is insufficient to prove that the trial judge's finding of non-discrimination was incorrect (*see supra* note 2). By this

reasoning, reversals of any finding made after an evidentiary contest would be inconceivable: any evidence a trial court "hears" could not be considered as undercutting a trial court's findings, no matter that the evidence was not taken into account in the trial court's analysis nor how clearly erroneous its findings might be in light of the evidence.

Such complete and unquestioning deference disregards this Court's explicit admonition that "deference does not imply abandonment or abdication of judicial review." *Miller-El*, 527 U.S. at 340. And it is particularly unwarranted in a case where the trial judge never discussed the evidence at issue, *id.* at 329, and specifically indicated at the time he admitted it that he might not give it any weight at all.[4]

Moreover, the trial judge to whom the court of appeals is deferring is the only jurist among the more than a dozen that have reviewed this case whose comprehension of *Batson* is so deficient that he did *not* find a *prima facie* case of discrimination[5] — and even refused to do so on remand from a state appellate decision holding that such a *prima facie case* had been proven. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Cr. App. 1988).[6] It is difficult to tell whether he simply misunderstood *Batson* or was so unreceptive to a claim of racial discrimination that he declined to consider compelling

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[4] *See* J.A. at 844.

[5] Even the State conceded in the prior proceedings in this Court that Miller-El had proven a *prima facie* case of discrimination. *See Miller-El*, 537 U.S. at 338.

[6] Not only did the trial judge not believe that a *prima facie* case had been proven, but he went so far as to hold that the extensive evidence presented "did not even raise an *inference* of racial motivation in the use of the state's peremptory challenges." *Miller-El*, 537 U.S. at 329 (emphasis added).

facts in support of the claim.[7] Either possibility casts doubt on his ability to weigh the evidence properly and make a legally correct finding under *Batson*. A more critical eye ought to be focused on a judge's findings when so glaring an error appears and was noted by this Court. But a critical perspective is wholly absent from the opinion below.

B. The Panel Disregarded Historical Evidence That Is Critical In Evaluating The Prosecutors' Assertions That Their Strikes Were Not Discriminatory

Amici will not review in detail all of the historical evidence presented to the trial court and discussed in this Court's prior opinion. A brief recapitulation of the evidence is set out at pages 12-14 below. But it is instructive to consider one example of the way in which disregarding that evidence can distort a court's assessment of the credibility of a prosecutor's purported non-racial reasons for his strikes — specifically, the prosecutors' explanations that jurors were struck because of attitudes concerning the death penalty.

The historical evidence shows that in the years immediately preceding Miller-El's trial, Dallas County prosecutors disproportionately struck African-Americans not just from Miller-El's jury, not just from the juries of other capitally charged African-Americans, not just from the juries of non-African-American capitally charged defendants, but from *all felony* cases for *all* defendants. (See *infra* p. 14.) Consistently with the training materials used in the Dallas District Attorney's office, African-American prospective jurors were excluded by the prosecutors across the board, in cases where

[7] At the conclusion of the original *Swain* hearing, after being presented with the training manual, the testimony of former prosecutors, the statistical evidence of exclusion, and testimony from judges and defense lawyers in support of the claim, the trial judge stated there was "*no evidence* presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." J.A. at 813 (emphasis added).

death-qualification was relevant and was conducted *and* in cases where it was not.[8]

By assessing the strikes in Miller-El's trial in isolation from what had happened in a multitude of other trials, the panel below ignored evidence that substantially undermined the prosecutors' explanations of their behavior in this case. "Death-qualification" fails as a nondiscriminatory explanation when exclusion by prosecutors consistently occurs in cases where death-qualification is neither necessary nor conducted.

By refusing to take account of this (and other) extensive, powerful evidence of racial discrimination in evaluating the prosecutor's explanations for using 10 of 14 peremptory challenges to exclude 91% of qualified African-Americans from Miller-El's jury, the panel undermined its own ability to reach any reasoned or realistic conclusion on the ultimate, critical issue of prosecutorial motivation. Worse, its ruling signals to those who "are of a mind to discriminate," *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), that they can do so with impunity. This extraordinary procedure is self-evidently perverse: it calls for *Batson* courts to close their eyes to evidence of pandemic, system-wide race prejudice that would have been judicially detectable under *Swain v. Alabama*.

II. THE PANEL'S EVALUATION OF THE EVIDENCE IN THIS CASE FLOUTS THIS COURT'S INTENTIONS IN *BATSON* AND PERPETUATES THE DISCRIMINATION THE COURT SOUGHT TO END

[8] This was shown by the testimony of prosecutors who worked in the office during the relevant period of time, as well as and testimony of judges and defense lawyers observing prosecutors in the courtroom

This Court aspired, through its decision in *Batson*, to end the pervasive and pernicious practice of excluding African-Americans from participation in the jury system. *Batson* was meant to stop the notorious practice of many state officials who professed a complete absence of racial motivation for their exclusionary actions but consistently discovered a whole host of reasons why African-Americans were unfit to serve.[9] When a court, such as the one below, feigns adherence to the rule of *Batson* but flouts its command through a "dismissive and strained" analysis of the evidence, *Miller-El*, 537 U.S. at 344, it is countenancing the continuation of that practice.

It is hard to imagine a *Batson* case with more overwhelming proof of discrimination than this one. As we have earlier pointed out, the panel below managed to overlook the obvious only because it ignored significant evidence, miscast the evidence it did consider, applied incorrect legal standards in assessing the latter evidence, and never looked at the body of evidence as a whole.

An analysis that weighed all of the evidence *cumulatively* to determine whether the exclusion of 91% of eligible African-Americans from Miller-El's jury was the product of racial discrimination would have framed the question more or less this way: With what degree of confidence can we say that these exclusions stemmed from a discriminatory motive and were not simply coincidental when we consider the evidence that

(1) the identical prosecutors exercising the strikes had been found to have discriminated in other cases in the same time

[9] *See, e.g.*, *Neal v. Delaware*, 103 U.S. 370, 397 (1880) (there were no qualified African-Americans); *Norris v. Alabama*, 294 U.S. 587, 598-99 (1935) (none who qualified were known to State officials charged with composing venire lists); *Swain v. Alabama*, 380 U.S. 202, 221 (1965) (their views and beliefs made them less impartial, and thus legitimately subject to peremptory strikes).

period, including the case of Miller-El's co-defendant;[10] **and** (2) the tool they were found to have used to discriminate in one of those cases was used in this case;[11] **and** (3) they race-coded their jury cards in this case, *Miller-El*, 537 U.S. at 346; **and** (4) their office made it an explicit policy to exclude African-Americans from juries, as evidenced in its training manual, memos used in training, and the testimony of former prosecutors and judges, *id.* at 335; **and** (5) the prosecutors in Miller-El's case joined the office and were trained in the art of jury selection at a time "when assistant district attorneys received formal training in excluding minorities from juries," *id.* at 347; **and** (6) there was testimony that the policy was still in effect at the time of Miller-El's trial, *id.* at 334-35; **and** (7) all of the other African-American capital defendants against whom the same prosecutor's office obtained death sentences in the prior five years were tried by all-white juries;[12] **and** (8) in that same time period, out of 180 jurors in 15 capital trials, only 5 (3%) were African-American, while 56 of 57 African-Americans qualified to serve on those juries but excluded (98%) were barred by prosecutors using

[10] *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy Jean) Miller-El v. State*, 790 S.W.2d 351 (Tex. App. - Dallas 1990), *petition for discretionary review refused* (Oct. 17, 1990).

[11] "Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)." *Miller-El*, 537 U.S. at 345.

[12] See Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1, J.A. at 815.

peremptory challenges;[13] **and** (9) although the stated explanation for excluding African-Americans in Miller-El's case (*i.e.*, that those excluded were weak on the death penalty) applied only to capital cases, a study of 100 randomly selected felony trials between 1983 and 1984, *where views on the death penalty were not at issue*, indicated that *87% of African-Americans qualified to serve were excluded* by prosecutors using peremptories;[14] **and** (10) the prosecutors acted to exclude African-Americans from Miller-El's jury on sight — before they were even questioned — by "shuffling" the panels, *Miller-El*, 537 U.S. at 333-34, 346; **and** (11) there was testimony that prosecutors had used "shuffling" in the past "to manipulate the racial composition of the jury," *id.* at 346; **and** (12) the prosecutors questioned African-American jurors differently than white jurors in Miller-El's case both on the issue resulting in exclusion, *id.* at 332, 343, and on other issues, *id.* at 332, 344;[15] **and** (13) the reasons given for striking African-American jurors "pertained just as well to some

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[13] Qualified African-Americans had a one in twelve chance of being selected for a capital jury, while whites had a one in three chance. Timms & McGonigle, *supra* note 12, J.A. at 815-16.

[14] African Americans were excluded from felony juries at almost five times the rate of whites); 80% of African-American felony defendants were tried by all-white juries; although African Americans comprised 18% of the county, they were less than 4% of felony case jurors; 72% of felony juries had no African Americans; and a qualified African American had only a one- in-ten chance of serving on a jury, while a white had a one-in-two chance; see Steve McGonigle, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds* DALLAS MORNING NEWS, March 9, 1986 at A1, J.A. at 698-99, 702-03.

[15] In prior proceedings, this Court "question[ed] the Court of Appeals' . . . dismissive and strained interpretation of petitioner's evidence of disparate questioning," *Miller-El* at 344. The Court unequivocally held that "disparate questioning did occur." *Id.* As Miller-El points out in his Petition for Writ of Certiorari, the Court of Appeals, despite this holding, still failed to find that disparate questioning occurred. Petition for Writ of Certiorari at 15-20.

white jurors who were not challenged and who did serve on the jury," *id.* at 343?

If one takes at all seriously the constitutional obligation of courts to root out discrimination in their own precinct, and if one looks at all of the evidence, there is no rational way to reach a conclusion other than that the exclusion of 91% of eligible African-Americans from Miller-El's jury resulted from discrimination and not coincidence.

The court below failed to reach this conclusion not only because it refused to look at the evidence as a whole, and not only because it improperly discounted the evidence of a continuous pattern and practice of discrimination by the prosecutors' office, but also because it incorrectly evaluated the evidence of jury shuffling, of disparate questioning, and of the seating of similarly situated white jurors. Its analysis on these latter issues is characterized by faulty reasoning and the erection of impossibly high — and erroneous — legal standards for proof of discrimination.

The panel below completely dismissed the evidence relating to the shuffling of the jury, even though this Court noted that "[o]n at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel." *Miller-El*, 537 U.S. at 334. "Shuffling" is a practice which "permits parties to rearrange the order in which members of the venire are examined," increasing or decreasing the likelihood that they might be empaneled by moving them into or out of the group to be questioned or dismissed. *Id.* at 333. Shuffling occurs "with no information about the prospective jurors other than their appearance." *Id.* at 333-34. In this case, the prosecutors not only shuffled the jury but also attempted to nullify a defense shuffle that moved African Americans forward, *id.*, citing violation of a rule the trial judge had never seen cited, let alone enforced, in twenty-five years in the county. *See* J.A. at 64-65.

The panel below offhandedly dismissed the prosecutors' use of the jury shuffle as evidence of intent to discriminate, citing the fact that Miller-El's lawyers also requested jury shuffles. The court doesn't explain how the defendant's request for a shuffle bears on the issue of what the *prosecutors'* intentions were in requesting shuffles. Its apparent equation of defense and prosecution shuffles reflects a disturbing confusion about the effect of shuffles at Miller-El's trial.

An attempt by an African-American defendant on trial for his life to make *possible* the *inclusion* of members of his own race on his jury cannot be equated with an attempt by the State to *exclude* such persons solely on the basis of their race. Miller-El's requested shuffles would have left in the pool African-Americans whose competence to serve would then be determined through *voir dire*, and who still would be subject to strikes by the prosecution or the defense. The State's shuffle permanently *excluded* African-Americans from the jury pool prior to any questioning and regardless of their qualifications. If the State successfully precluded participation by a group of people because of their race, in part through the use of the shuffle, the trial jury that convicted Miller-El was unconstitutionally composed and that conviction unconstitutionally obtained, no matter what motivated the defendant's request for shuffles.[16]

Miller-El's petition for certiorari contains specific examples of the panel's misleading analysis of the *voir dire* questioning of African-American and white jurors, and we need not rehearse that subject here. (See Petition for Writ of Certiorari at 20-26.) We write briefly on this issue only to raise concerns

[16] The court below may have been mistakenly viewing the defense shuffles as a discriminatory attempt to exclude white people -- but that is a statistical impossibility given the demographics. Even were the question a closer one, any concern about defense-sought shuffles cannot conceivably justify allowing Miller-El to be executed after conviction by a jury from which all African-American venirepersons were excluded by the prosecution's discriminatory shuffle and discriminatory peremptory strikes.

about what appears to be the lower court's standard for considering prospective jurors to be "similarly situated."

The court appears to be setting a standard that is impossible to meet: African-American and white jurors must be identical in every respect; they must use identical language to explain their thoughts and feelings, 361 F.3d at 859, and all of the possible race-neutral reasons for excluding them must exist in the same combination, *id.* at 859-60. Since this Court has said that virtually any race-neutral explanation is legitimate, *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (*per curiam*), under the approach taken below, a prosecutor could *always* evade a finding that jurors were similarly situated by carefully varying the race-neutral reasons articulated for various peremptory challenges, knowing that prospective jurors would not be considered "similarly situated" unless they had the same jobs, lived in the same neighborhoods, had children (or not) of the same ages, had spouses with the same jobs, had the same personal experiences with law enforcement (etc.), *in the same combination*.[17] No *Batson* challenge could ever succeed under such a standard, and this Court has never set such a standard.

[17] We only need one case to illustrate the variety of reasons prosecutors have employed to justify peremptory strikes against African Americans. In *Robinson v. State*, 773 So.2d 943, 949 (Miss. App. 2000), the State used 7 of 10 peremptory challenges to exclude prospective African-American jurors. Reasons proffered by the prosecution were 1) perceived hostility to the prosecution; 2) possible irresponsibility evidenced by the fact that questionnaires showed the jurors had children but were not married, although the prosecutor did not know whether the jurors were divorced or had children out of wedlock; 3) residence in a high crime area; 4) sleeping during voir dire; 5) not providing answers on the questionnaire, thereby creating uncertainty about ties to the community; 6) serving on a jury that acquitted. In *Robinson*, the court considered the totality of the evidence and concluded that *Batson* had been violated.

Conclusion

"Notwithstanding history, precedent, and the significant benefits of the peremptory challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded." *Powers v. Ohio*, 499 U.S. 400, 430 (1991) (Rehnquist, C.J., dissenting). Miller-El's was just such a jury.

The harm in this case is not just to Miller-El, but also to the African-Americans struck from jury service in this case, the African-American community in Dallas that lived through years of exclusion from jury service by the State, and the system of justice itself, which has been tainted by the discrimination injected by the prosecutors.

This Court's decision a year ago in *Miller-El* gave hope that the courts, following the Court's guidance, would take seriously their responsibility to scrutinize and remedy claims of racial discrimination in jury selection. The Court's opinion recognized the stark reality of the administration of criminal justice in Dallas in the 1980's, when Miller-El's trial took place. As the Court saw and said, "the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Miller-El*, 537 U.S. at 347. The opinion of the court below on remand, which minimizes, rationalizes and ignores that reality, must not be the last word. *Amici* respectfully urge that the decision below be reversed or vacated, and relief granted to the Petitioner Miller-El.

Respectfully submitted,

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No. 03-9659

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX VOLUME I OF II

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JOINT APPENDIX TABLE OF CONTENTS

DESCRIPTION — Page

VOLUME I

1. *Miller-El* v. *Dretke*, 361 F.3d 849 (5th Cir. 2004) 1
2. *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) 21
3. General Docket-U.S. Court of Appeals for the Fifth Circuit, No. 00-10784 65
5. Civil Docket-U.S. District Court for the Northern District of Texas, No. H:96-CV-1992 74
6. Docket-Court of Criminal Appeals, Texas, No. 69,677 96
7. *Jury Selection in a Criminal Case*, Memorandum, Jon Sparling 99
8. Transcript excerpts re: jury shuffle: 6-9; 15-17; 658; 773-776; 842; 1529-1538; 1777-1795 113
9. Index to voir dire testimony 133
10. Voir dire testimony of Roderick Bozeman: 273-325 142
11. Voir dire testimony of Billy Jean Fields: 397-458 169
12. Voir dire testimony of Joe Warren: 1519-1560 200
13. Voir dire testimony of Noad Vickery: 1564-1636 220
14. Voir dire testimony of Edwin Rand: 1796-1856 260
15. Voir dire testimony of Carrol Boggess: 2000-2046 290
16. Voir dire testimony of Wayman Kennedy: 2170-2241 314
17. Voir dire testimony of Marie Mazza: 2304-2342 350
18. Voir dire testimony of Kevin Duke: 3260-3321 370
19. Voir dire testimony of Troy Woods: 3837-3879 403

JOINT APPENDIX TABLE OF CONTENTS—Continued

Page

20. Voir dire testimony of Sandra Hearn: 4537-4661 427

VOLUME II

21. Other excerpts from voir dire testimony: 55; 59-61; 86; 90-91; 94-95; 104; 107-110; 130-134; 152; 155-156; 176-178; 196; 203-204; 228-231; 332; 354-358; 392; 478; 482-485; 492; 506-512; 523; 527; 529-531; 548-551; 598; 603-605; 668; 670-671; 723; 728-729; 754-759; 829; 837; 922; 1005; 1012; 1016-1019; 1024; 1031; 1045-1052; 1063; 1070; 1072-1074; 1094-1098; 1127; 1130; 1134-1037; 1164-1168; 1207-1211; 1221; 1224-1229; 1252; 1255; 1258-1260; 1282-1286; 1369; 1372-1373; 1390-1394; 1437; 1441-1445; 1480; 1483-1485; 1640; 1645-1648; 1787-1788; 1866; 1870-1873; 1945; 1948; 1998; 2050; 2053-2054; 2103; 2107-2109; 2132-2139; 2158; 2242; 2246-2248; 2251; 2270-2273; 2345-2377; 2379-2380; 2399; 2401-2402; 2408; 2412-2414; 2435-2439; 2471-2474; 2518; 2520-2522; 2580; 2584-2589; 2651; 2654-2656; 2675-2677; 2738-2741; 2743; 2746-2748; 2770-2774; 2824-2825; 2828-2829; 2846-2851; 2913; 2916-2918; 2939-2945; 2985; 2988-2991; 3007-3013; 3017; 3020; 3023-3025; 3046-3051; 3090-3093; 3157; 3161-3163; 3185-3191; 3246; 3322; 3325-3327; 3351-3355; 3417; 3433-3465; 3469-3470; 3503; 3508-3511; 3525-3535; 3666; 3669-3670; 3677; 3679-3680; 3702-3709; 3744; 3747-3748; 3781-3782; 3784; 3786-3787; 3801-3808; 3884; 3886-3887; 3904-3909; 3942; 3946-3949; 4022; 4028; 4039-4040; 4056-4062; 4102; 4107-4110; 4168; 4171; 4173-4174; 4187-4196; 4240-4277; 4296; 4301; 4304-4308; 4314; 4328-4331; 4373; 4377-4392; 4452; 4454-4455; 4471-4479; 4487; 4526 487

JOINT APPENDIX TABLE OF CONTENTS—Continued

Page

22. Transcript of pre-trial (*Swain*) hearing (Dallas County, No. 5, Mar. 12, 1986) 790

23. *Miller-El* v. *State*, 748 S.W.2d 459 (Tex. Crim. App. Mar. 3, 1988) 885

24. Transcript of remand (*Batson*) hearing (Dallas County, No. 5, May 10, 1988) 890

25. Findings of Fact and Conclusions of Law Upon Remand From The Court of Criminal Appeals, *Miller-El* v. *State*, No. 8668-NL (Dallas County, No. 5, Jan. 13, 1989) 924

26. *Miller-El* v. *State*, No. 69,677 (Tex. Crim. App. Sept. 16, 1992) 930

27. Findings and Recommendations of the United States Magistrate Judge, *Miller-El* v. *Johnson*, No. 3-96-CV-1992-H (N.D. Tex. Jan. 31, 2000) 946

28. Memorandum Opinion and Order, *Miller-El* v. *Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000) 987

29. *Miller-El* v. *Johnson*, 261 F.3d 445 (5th Cir. 2001) 993

30. Excerpts from Miller-El's brief on direct appeal to the Texas Court of Criminal Appeals, filed Apr. 27, 1987 1008

31. Excerpts from Miller-El's motion for rehearing before the Texas Court of Criminal Appeals, filed Nov. 30, 1992 1013

32. Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, Dallas Morning News, Mar. 9, 1986, at A1 (Westlaw reprint) 1018

JOINT APPENDIX TABLE OF CONTENTS—Continued

Page

33. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, Dallas Morning News, Dec. 21, 1986, at Al (Westlaw reprint) 1036
34. U.S. Supreme Court order granting petition for writ of certiorari (June 28, 2004) 1052

United States Court of Appeals
Fifth Circuit

Thomas Joe MILLER-EL,
Petitioner-Appellant,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

No. 00-10784

Feb. 26, 2004

Appeal from the United States District Court
for the Northern District of Texas

[361 F.3d 849]

Before DAVIS, JONES and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Petitioner brings this federal habeas corpus petition claiming, pursuant to *Batson* v. *Kentucky*, that the state trial court erred in finding that there was no purposeful discrimination in the selection of his jury. The district court denied Petitioner relief. The district court then denied a certificate of appealability ("COA"). Petitioner previously appealed to this court and we denied a COA. The Supreme Court reversed. We then granted COA and now address the merits of Petitioner's appeal.

BACKGROUND

On November 16, 1985, Thomas Jo Miller-El, his wife, and Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. During the robbery two employees, Doug Walker and Donald Hall, were ordered to lie on the floor, gagged with strips of fabric, and their hands and feet were bound. Miller-El

shot Walker twice in the [852] back and shot Hall in the side. Walker died from his wounds.

The state indicted Miller-El for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, Miller-El moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding blacks through the use of peremptory challenges. Miller-El's trial occurred before the Supreme Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, Miller-El sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding blacks from jury service. In a pretrial hearing held on March 12, 1986, Miller-El presented evidence in support of his motion. The trial judge, however, found "no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." The state court then denied Miller-El's motion to strike the jury. Twelve days later, the jury found Miller-El guilty; and the trial court sentenced him to death.

Miller-El appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Supreme Court issued its opinion in *Batson* v. *Kentucky* and established a three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. 476 U.S. at 96-98, 106 S.Ct. 1712. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the

trial court must determine whether the defendant has shown purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712.

After acknowledging Miller-El had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El* v. *State*, 748 S.W.2d 459, 461 (Tex. Crim. App. 1988) (en banc). A post-trial hearing was held on May 10, 1988. There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial.

On January 13, 1989, the trial court concluded that Miller-El's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a *prima facie* case. Notwithstanding this conclusion, the state court determined that the state would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each black venire member excluded. The court further found "no disparate prosecutorial examination of any of the venire [members] in question" and "that the primary reasons for the exercise of the challenges against each of the venire [members] in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty."

The Texas Court of Criminal Appeals denied Miller-El's appeal, and the Supreme Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Miller-El's state habeas proceedings fared no better, and he was [853] denied relief by the Texas Court of Criminal Appeals.

Miller-El filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254.[1] The federal magistrate judge who considered the merits of the *Bat-*

[1] Although Miller-El raised four issues, the petition has been narrowed down by the Supreme Court to only the jury selection claim premised on Batson. *See Miller-El* v. *Cockrell*, 537 U.S. 322, 329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

son claim recommended, in deference to the state court's acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that Miller-El be denied relief. The United States district court adopted the recommendation. Pursuant to 28 U.S.C. § 2253, Miller-El sought a COA from the district court, and the application was denied. Miller-El renewed his request to this Court, and we also denied a COA. Miller-El appealed to the Supreme Court and certiorari was granted. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002). In an opinion issued on February 25, 2003, the Supreme Court concluded based on a "threshold examination" of the record, that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and thus we had erred in not granting COA on Miller-El's *Batson* claim. *Miller-El* v. *Cockrell*, 537 U.S. 322, 347-48, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Supreme Court remanded the case to this Court to determine whether Miller-El can "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Id.* at 348, 123 S.Ct. 1029. We granted COA for precisely that determination. *Miller-El* v. *Johnson*, 330 F.3d 690 (5th Cir.2003)(per curiam).

DISCUSSION

Claims of racial discrimination in jury selection are evaluated according to the framework established in *Batson* v. *Kentucky*, which requires a three-step analysis that shifts the burden of production between the parties. 476 U.S. at 96-98, 106 S.Ct. 1712. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. 1712. Second, if the requisite showing has been made, the burden shifts to the prosecution to provide a race-neutral explanation for striking the venire member in question. *Id.* at 97-98, 106 S.Ct. 1712. Third, the defendant again has the burden, this time of proving purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712. Under *Batson*, the ultimate burden of persuading the court that the state's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. *Id.* at 94 n. 18, 106 S.Ct. 1712 (citing *Tex. Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)); *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

In the present case, there is no dispute that Miller-El presented a *prima facie* claim under *Batson*'s first step. Nor is there any dispute that the prosecution presented facially race-neutral reasons for exercising each peremptory challenge. The only issue is Miller-El's disagreement with the trial court's determination at *Batson*'s third step that Miller-El had failed to show that the prosecution's reasons for exercising the challenged peremptory strikes were not credible and Miller-El had not demonstrated that purposeful discrimination **[854]** had occurred. The federal district court has already determined on habeas review that Miller-El has failed to show that the state court erred, and therefore is not entitled to habeas relief. Miller-El is now appealing this determination and COA has been granted. Therefore we now address the merits of Miller-El's appeal.

Under the current scheme for habeas review in federal court, which was substantially updated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(e)(1) requires that we "presum[e]" the state court's findings of fact "to be correct" unless Miller-El can rebut the presumption "by clear and convincing evidence."[2] As the Supreme Court has stated, the state court's finding at step three of Miller-El's *Batson* claim was a finding of fact

[2] The language of § 2254(e)(1) could not be clearer:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

and therefore subject to § 2254(e)(1)'s presumption of correctness. Miller-El, 537 U.S. at 339, 123 S.Ct. 1029 (citing *Hernandez* v. *New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), for the proposition that the determination made at step three of *Batson* is a " 'pure issue of fact' accorded significant deference").

We follow the lead of the Supreme Court in utilizing their decisions in *Hernandez* v. *New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett* v. *Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), to guide our decision regarding the trial court's finding of no purposeful discrimination at step three in this *Batson* claim. These Supreme Court opinions state that the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness and credibility of the prosecutor's justification for his peremptory strike. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *Hernandez*, 500 U.S. at 364-65, 111 S.Ct. 1859. Further, these cases, applying a standard of review even less deferential to the trial court's finding than we are required to apply under AEDPA, articulate that deference is necessary because the reviewing court is not as well positioned as the trial court to make credibility determinations, and once the trial court has made a credibility determination concerning the prosecutor's state of mind regarding the peremptory strikes, the step three determination under *Batson* has been decided. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769 (citing 28 U.S.C. § 2254(d)(8) and stating that the standard of review for a federal habeas claim required that the factual findings of the state court be presumed to be correct, and "may be set aside, absent procedural error, only if they are 'not fairly supported by the record' "); *Hernandez*, 500 U.S. at 366-67, 111 S.Ct. 1859 (applying, on direct review of a state court's factual findings, a "clearly erroneous" standard).

Miller-El argues that the state court's finding of the absence of purposeful discrimination was incorrect and the corresponding factual determinations were "objectively unreasonable" in light of the following four areas of evidence that

he claims were before the court. First, evidence of historical discrimination by the Dallas County District Attorney's office in the selection of juries. Second, the use of the "jury shuffle" tactic by the prosecution. Third, the alleged similarity **[855]** between non-black venire members who were not struck by the prosecution and six blacks who were. Fourth, evidence of so-called disparate questioning with respect to venire members' views on the death penalty and their ability to impose the minimum punishment.

First, Miller-El argues that he presented evidence of the Dallas County District Attorney's office "unofficial policy" of excluding blacks from jury service. Some of this evidence was first presented in the *Swain* hearing conducted by the trial court. When Miller-El's counsel attempted to reintroduce this historical evidence at the post-trial *Batson* hearing, the prosecution objected, arguing that even if accurate the evidence was irrelevant under *Batson*. The court admitted the evidence but reserved the right to give it no weight.

As the United States magistrate judge found, there was considerable evidence that the Dallas County District Attorney's office had an unofficial policy of excluding blacks from jury service and that this evidence was disturbing. The district court accepted this finding. But both the magistrate and district court noted that the historical evidence, however disturbing, is not determinative of whether there was purposeful discrimination in the selection of Miller-El's jury. We also note that the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable. The Supreme Court stated that proof "that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection" is "relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions" in Miller-El's case. *Miller-El*, 537 U.S. at 347, 123 S.Ct. 1029. In this case, however,

the relevancy of this evidence is less significant because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case. This historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however, as explained below the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect.

Second, Miller-El argues that the state court erred in not finding purposeful discrimination based on the use of the "jury shuffle" tactic by the prosecution. The record, however, clearly establishes that Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice. Again, Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons for exercising the challenged peremptory strikes articulated by the prosecutors and accepted by the state court who observed the *voir dire* process including the jury shuffles.

Third, Miller-El argues that there were similarities between non-black venire members who were not struck by the prosecution and six blacks who were. Miller-El maintains that the following six black venire members were victims of racially motivated peremptory strikes: Roderick **[856]** Bozeman, Billy Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy.

As to each of the black venire members Miller-El claims were the victims of racially motivated peremptory strikes, it is important to identify the prosecution's stated reasons for

exercising a peremptory challenge. Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident. Further, we can determine from the record that there were no unchallenged non-black venire members similarly situated, such that their treatment by the prosecution would indicate the reasons for striking the black members were not genuine.[3]

Roderick Bozeman stated that while he believed in the death penalty as a general proposition, he thought it was only appropriate "if there's no possible way to rehabilitate a person." If Bozeman thought there was a chance of rehabilitation, he did not think the death penalty was appropriate. He said that a "mentally disturbed" person and "a Manson type" were examples of someone who could not be rehabilitated. He said, however, that repeated criminal acts of violence would not necessarily indicate that a person was beyond rehabilitation. Bozeman classified himself as the type of person who believed in the death penalty in principle, but who could not actually serve on a capital jury. He verified his inability to impose the death penalty by stating that even if the evidence compelled "yes" answers to the special issues posed to the jury at the punishment stage, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. The prosecution exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his belief that a pattern of violent conduct would not be sufficient to render a defendant deserving of death, and his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence.

Venire member Billy Jean Fields stated that he believed in the death penalty and could serve on a capital jury.

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[3] With the exception of black venire members Joe Warren and Paul Bailey, the prosecution set forth its race-neutral reasons for exercising the peremptory challenges immediately after exercising the strikes. At the subsequent *Batson* hearing the court took judicial notice of that prior testimony in the *voir dire* record. Miller-El has not based his claim on the prosecution striking Bailey.

However, after being informed that the possibility of rehabilitation would be a factor he would need to consider in assessing whether to impose the death penalty, Fields proclaimed that his religious belief was that no one was beyond rehabilitation. Fields stated, "I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." He further stated, "when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." Additionally, Fields indicated in his questionnaire and in response to questions by the prosecution that his brother had been incarcerated numerous times for drug offenses. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that his deeply held religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence and the fact that his brother had been convicted of a felony.

Venire member Joe Warren answered questions during *voir dire* in a noncommital **[857]** manner and indicated ambivalence about the death penalty and his ability to impose it. He stated, "there are some cases where I would agree [with the death penalty], you know, and there are others that I don't." When the prosecution described the crimes defined as capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, he responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." When asked whether he could make a decision between a life sentence and a death sentence, Warren answered, "I think I could." When questioned about his ability to answer the future dangerousness special issue question, Warren responded, "I suppose there's always a chance, but there

again, you never know." Finally, Warren stated, "Well, it[']s just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice." The prosecution exercised a peremptory challenge to remove Warren. Miller-El's counsel did not object to the peremptory strike against Warren contemporaneous to the strike, therefore the prosecution did not give its race-neutral reasons at *voir dire*. At the *Batson* hearing, the prosecutor cited Warren's hesitation about imposing the death penalty and his inconsistent responses during *voir dire* as the reasons for striking him. The prosecutor also noted that Warren was struck relatively early in the jury selection process when the state had ten challenges remaining before exercising one to remove Warren. The prosecutor noted at the *Batson* hearing that an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses and peremptory challenges either remain unused or get used more rapidly. In fact, the prosecutor on cross-examination at the *Batson* hearing admitted that he would have struck non-black jurors Sandra Hearn and Fernando Gutierrez, who also gave somewhat ambivalent answers regarding the death penalty, before Warren, had they come up earlier in the process.

Venire member Edwin Rand described capital punishment as a "touchy subject" during *voir dire* but did indicate on his questionnaire that he believed in the death penalty. In response to several alternative choices put to him by the prosecution, Rand described himself as a person who may or may not be able to impose the death penalty. He said, "Somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." The prosecution exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his lack of ability to serve on a capital jury.

Venire member Carrol Boggess indicated on her questionnaire that she had a moral, religious, or personal belief

that would prevent her from imposing the death penalty. During *voir dire* she stated, "Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." Later she stated, "I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence, is that correct?" When directly asked whether she could vote for a death sentence, she stated, "I've never been in that [858] situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure." She continued by stating "whether or not I could actually go through with murder--with killing another person or taking another person's life, I just don't know. I'd have trouble with that." Boggess also indicated that she had testified as a defense witness at her nephew's theft trial. The prosecution exercised a peremptory challenge to remove Boggess, citing as reasons for the strike her hesitancy about assessing a death sentence and the fact that she had served as a defense witness in her nephew's trial.

Venire member Wayman Kennedy stated on his questionnaire he believed in the death penalty "only in extreme cases." On *voir dire* he stated that he believed in the death penalty only for mass murders or cases involving mutilation. Kennedy stated he did not think a murder in the course of a robbery would necessitate the death penalty because "why wouldn't a life sentence be enough." Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could." The prosecution exercised a peremptory challenge to remove Kennedy, citing his hesitancy to assess the death penalty for murder in the course of robbery, the crime Miller-El was accused of, his view that the death penalty was only appropriate in extreme cases, and his hesitancy in stating that he could answer the special issues according to the evidence.

Miller-El claims that three non-black venire members, Sandra Hearn, Marie Mazza, and Ronald Salsini, expressed views about the death penalty as ambivalent as those expressed by Bozeman, Fields, Warren, Rand, Boggess, and Kennedy, but the three non-black venire members were not struck by the prosecution. The record, especially the *voir dire* transcript, does not support this assertion.

Sandra Hearn stated in her jury questionnaire and on *voir dire* that she believed in the death penalty and could assess it in appropriate cases. She did express the belief that someone should not be sentenced to death on a first offense but if the person had committed any prior offense including robbery or some other criminal act of violence the death penalty would be appropriate. The evidence admitted at the punishment phase of Miller-El's trial indicated he had committed two previous armed robberies and one also involved a kidnaping. Hearn also stated she thought the death penalty should be available for more than just murder but also severe torture and extreme child abuse. She indicated that she had respect for law officers, that her father was a retired FBI agent, and that she had daily contact with police officers in her employment. Miller-El's counsel must have believed Hearn was a pro-prosecution venire member because he attempted to have her challenged for cause on numerous grounds, and when the trial judge found Hearn qualified, Miller-El's counsel requested an additional peremptory strike in order to remove her. In fact, on direct appeal Miller-El continued to argue that the trial court erred in denying his challenge for cause of Hearn, so it seems disingenuous to argue now that she was similarly situated to the black jurors who expressed reservations about imposing the death penalty.

Venire member Maria Mazza indicated on her juror questionnaire that she believed in the death penalty. When asked about her feelings on the death penalty at *voir dire*, she stated, "It's not an easy one and I feel that it depends upon the case, [859] the testimony.... It's kind of hard determining somebody's life, whether they live or die, but I

feel that is something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." Mazza served on Miller-El's jury.

Venire member Ronald Salsini stated he believed in the death penalty and that he could impose the death penalty. He did indicate imposing the death penalty would be difficult; however, he gave a hypothetical crime based on his personal experience as a bank teller that closely paralleled the crime Miller-El was charged with and stated that such a criminal act was deserving of the death penalty. The prosecution did not strike Salsini but Miller-El's counsel did.

Comparing the views expressed by Hearn, Mazza, and Salsini to the views expressed by the challenged black venire members, it is clear that Hearn, Mazza, and Salsini were not similarly situated for several reasons. First, ambivalence about the death penalty was not the sole reason for striking Bozeman, Fields, or Boggess. Second, Warren, Rand, and Kennedy were struck mainly because of ambivalence about the death penalty, but they each also expressed doubts about whether they personally could impose the death penalty even if the evidence indicated the death penalty was appropriate. This was not the case with Hearn, Mazza, and Salsini. Third, Warren refused to give a clear answer as to whether or not he could impose the death penalty if the evidence warranted it. Fourth, Kennedy stated the death penalty should be limited to extreme cases. Finally, Rand's ambivalence was less pronounced and more in line with the uncertainty expressed by Hearn and Mazza, although Rand still indicated he was uncertain as to whether he could impose the death penalty. Under our federal habeas standard of review, however, Miller-El has not shown by clear and convincing evidence that the trial court, who observed the *voir dire* process, erred in finding the prosecution's reason for striking Rand or the other black venire members credible.

Next, Miller-El claims non-black unchallenged venire members Hearn and Kevin Duke expressed views on rehabilitation similar to the views expressed by the black challenged venire members. Hearn's views have already been discussed. Duke expressed support for the death penalty and said he could impose it. Duke made comments concerning rehabilitation in the context of the availability of parole, not in the context of whether the death penalty was appropriate. Duke served on Miller-El's jury.

Again, the record does not support Miller-El's assertion. While the prosecution only cited views concerning rehabilitation as grounds for striking Bozeman and Fields, that was not the sole basis for exercising those strikes. As previously noted, Bozeman's and Fields' views on rehabilitation were much stronger than Hearn's and Duke's. Hearn and Duke were not similarly situated to any challenged black venire members.

Finally, Miller-El asserts that non-black venire members Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner were similarly situated to challenged black venire members who had family members with a criminal background. When Vickery was fifteen his sister had been arrested and served time in California. Vickery was a strong state juror and after unsuccessfully attempting to have him struck for cause, Miller-El used one of his preliminary strikes to remove Vickery. Davis' husband had been convicted of theft ten years earlier. Davis was a strong state juror and Miller-El attempted to have her struck for cause but was unsuccessful. Therefore, Miller-El used one of **[860]** his preliminary strikes to remove her. Nix's brother entered a guilty plea in a high profile white-collar crime case. Nix, who served as an office manager for her brother's construction company, had been named in several civil suits relating to the white-collar crime issues. Nix was a strong prosecution juror and Miller used one of his preliminary strikes to remove her from the panel. Weiner's ten-year-old son had once been arrested for shoplifting. Weiner served on Miller-El's jury.

Again, the record does not support Miller-El's *Batson* claim. The prosecution only cited a family member with criminal history as grounds for striking Boggess and Fields.

Furthermore, that was not the sole basis for striking either Boggess or Fields. In summary, Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members on whom he is basing his *Batson* claim. Therefore, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its preliminary challenges credible.

Fourth, Miller-El also argues that the prosecution posed different questions concerning the death penalty and the minimum allowable punishment to the venire members depending on the race of the venire member. The record, however, reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race. The prosecution used questioning to either ferret out a venire member's views on the death penalty or to establish a basis to disqualify venire members who had unfavorable views but were not subject to disqualification on those grounds.

One hundred and eight venire members survived the initial round of hardship excuses. The court excused three members for cause prior to *voir dire* and the parties agreed to remove thirty-nine others, including five blacks. Thus, a total of sixty-six venire members were subject to full *voir dire*, including fifty-one non-blacks and fifteen blacks.

The prosecution questioned all venire members concerning their views of the death penalty. A majority of the venire members were informed the state was seeking the death penalty and that affirmative answers to three questions submitted to the jury at the punishment phase would result in Miller-El being sentenced to death, and then asked about their views concerning the death penalty. Prosecutors did utilize a "graphic script" to describe an execution in detail to some venire members. Both black and non-black venire members who had expressed reservations never received the script. However, all black venire members given the graphic script had expressed some level of reservations about the death penalty in their juror questionnaires including Boggess, Kennedy, Bailey, Linda

ing Boggess, Kennedy, Bailey, Linda Baker, Troy Woods,[4] Janice Mackey, Anna Keaton, and Jeanette Butler.[5] Some of the non-black venire members questioned with the graphic script expressed reservations including Dominick Desinise and Clara Evans. Non-black venire member Vivian Sztybel did not express reservations about the death penalty yet still received the graphic **[861]** script. Sztybel was ultimately seated on Miller-El's jury.

Miller-El contends that there were ten black venire members who expressed reservations and seven of these venire members, who were ultimately peremptory challenged by the prosecution, got the script, while there were ten non-black venire members who expressed reservations but only two got the script. Miller-El argues this disparity proves purposeful discrimination and therefore the trial court erred. A review of precisely what the prosecution did in terms of *voir dire* questioning indicates the trial court, who observed the *voir dire* process, did not err in finding there was no purposeful discrimination.

The jury questionnaire asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?" Venire members could circle "yes" or "no," and then they were asked to "[p]lease explain your answer." Question 58 allowed venire members to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?"

Presumably, the eight non-blacks who did not receive the graphic script, but Miller-El thinks should have, answered "no" to question 56 and answered to "yes" to ques-

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[4] Woods' questionnaire did not clearly indicate his views on the death penalty and thus he received the graphic script, but on *voir dire* he indicated that he fully supported the death penalty, the state believed him to be an excellent juror and he was in fact seated on Miller-El's jury.

[5] Jeanette Butler's juror questionnaire is not contained in the record, however, at *voir dire* she stated that she was unwilling to impose the death penalty. Butler was ultimately removed for cause.

tion 58. Questioning on *voir dire* also indicates there was no uncertainty as to the views of these eight non-black venire members. They were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts; in fact, a detailed description may have simply antagonized them and turned them off to the prosecutors. In fact, of these eight, five were removed for cause because of their views on the death penalty, including John Nelson, Linda Berk, Gene Hinson, Sheila White, and Joyce Willard while one, Leta Girard, was removed by agreement of the parties. The two others also had strong views, making use of the graphic script unnecessary. Margaret Gibson did not believe in the death penalty and the state exercised a peremptory challenge to remove her. James Holtz believed the death penalty was appropriate only if a police officer or fireman was murdered and the state exercised a peremptory challenge to remove him.

The prosecution treated the black venire members no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence. This included Bozeman, Fields, Warren, and Rand. The black venire members who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing a combination of uncertainty and philosophical opposition to the death penalty. Those venire members included Boggess, Kennedy, Baker, Woods, Mackey, Bailey, and Keaton.

In summary, sixteen venire members for whom questionnaire information is available, clearly indicated on the questionnaires their feelings on the death penalty, and fifteen of them did not receive the graphic script. The one who did receive the script was non-black venire member Sztybel. Eight venire members gave unclear answers and those eight venire members received the graphic script. The answers given, not race, accurately indicated whether a venire member got the graphic script, and this is confirmation of the prosecution's race-neutral rationale.

[862] The prosecution also did not question venire members differently concerning their willingness to impose the minimum punishment for the lesser-included offense of murder. Different questioning on the minimum sentence issue was used as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ what Miller-El argues is a "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic death penalty questioning.

Seven black venire members were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. These individuals included Rand, Kennedy, Bozeman, Warren, Baker, Boggess, and Fields.

According to Miller-El's argument the prosecution should have used the "manipulative" punishment script on Woods. But Woods gave answers indicating he would be an excellent state's juror and therefore the prosecution had no reason to attempt to have him removed. Had the prosecution sought to eliminate blacks because of race, the use of the "manipulative" script would have been deployed against Woods. But it was not, because the prosecution wanted Woods on the jury.

Likewise, there are no similarly situated non-black venire members who, under the prosecution's rationale, would have been questioned about minimum sentencing. This is true because unless a venire member indicated he would be a poor state's juror and would not otherwise be struck for cause or by agreement, there was no reason to use the "manipulative" script. Thus, of the ten non-black venire members who expressed opposition to the death penalty, eight were struck for cause or by agreement, meaning no "manipulative" script was necessary to get them removed.

Those struck included Desinise, Evans, Nelson, Berk, Hinson, White, Willard, and Girard. The other two non-black venire members Gibson and Holtz were both given the "manipulative" script and peremptorily struck.

In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred. Therefore, the district court correctly denied Miller-El habeas relief.

CONCLUSION

Having carefully reviewed the record in this case, the parties' respective briefing and arguments, and for the reasons set forth above, we affirm the decision of the district court in its denial of habeas relief to Miller-El because he has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination.

AFFIRMED.

Supreme Court of the United States

Thomas Joe MILLER-EL,
Petitioner,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division

No. 01-7662

Argued Oct. 16, 2002
Decided Feb. 25, 2003

[537 U.S. 322]

Justice KENNEDY delivered the opinion of the Court.

In this case we once again examine when a state prisoner can appeal the denial or dismissal of his petition for writ of habeas corpus. In 1986 two Dallas County assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury which tried petitioner Thomas Joe Miller-El. During the ensuing 17 years, petitioner has been unsuccessful in establishing, in either state or federal court, that his conviction and death sentence must be vacated because the jury selection procedures violated the Equal Protection Clause and our holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The claim now arises in a federal petition for writ of habeas corpus. The procedures and standards applicable in the case are controlled by the habeas corpus statute codified at Title 28, chapter 153, of the United States Code, most recently amended in a substantial manner by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions.

The United States District Court for the Northern District of Texas, after reviewing the evidence before the state

trial court, determined that petitioner failed to establish a constitutional violation warranting habeas relief. The Court of Appeals for the Fifth Circuit, concluding there was insufficient merit to the case, denied a certificate of appealability **[327]** (COA) from the District Court's determination. The COA denial is the subject of our decision.

At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, *supra*, at 484, 120 S.Ct. 1595. Applying these principles to petitioner's application, we conclude a COA should have issued.

I

A

Petitioner, his wife Dorothy Miller-El, and one Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. They emptied the cash drawers and ordered two employees, Doug Walker and Donald Hall, to lie on the floor. Walker and Hall were gagged with strips of fabric, and their hands and feet were bound. Petitioner asked Flowers if he was going to kill

Walker and Hall. When Flowers hesitated or refused, **[328]** petitioner shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The State indicted petitioner for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When *voir dire* had been concluded, petitioner moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Petitioner's trial occurred before our decision in *Batson*, *supra*, and *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), was then the controlling precedent. As *Swain* required, petitioner sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing held on March 12, 1986, petitioner presented extensive evidence in support of his motion. The trial judge, however, found "no evidence ... that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." App. 813. The state court then denied petitioner's motion to strike the jury. *Ibid.* Twelve days later, the jury found petitioner guilty; and the trial court sentenced him to death.

Petitioner appealed to the Texas Court of Criminal Appeals. While the appeal was pending, on April 30, 1986, the Court decided *Batson v. Kentucky* and established its three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. 476 U.S., at 96-97, 106 S.Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97-98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court must determine **[329]** whether the defendant

has shown purposeful discrimination. *Id.*, at 98, 106 S.Ct. 1712.

After acknowledging petitioner had established an inference of purposeful discrimination, the Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*. *Miller-El v. State*, 748 S.W.2d 459 (1988). A post-trial hearing was held on May 10, 1988 (a little over two years after petitioner's jury had been empaneled). There, the original trial court admitted all the evidence presented at the *Swain* hearing and further evidence and testimony from the attorneys in the original trial. App. 843-844.

On January 13, 1989, the trial court concluded that petitioner's evidence failed to satisfy step one of *Batson* because it "did not even raise an inference of racial motivation in the use of the state's peremptory challenges" to support a prima facie case. App. 876. Notwithstanding this conclusion, the state court determined that the State would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each African-American excluded. The court further found "no disparate prosecutorial examination of any of the veniremen in question" and "that the primary reasons for the exercise of the challenges against each of the veniremen in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty." *Id.*, at 878. There was no discussion of petitioner's other evidence.

The Texas Court of Criminal Appeals denied petitioner's appeal, and we denied certiorari. *Miller-El v. Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.Ed.2d 67 (1993). Petitioner's state habeas proceedings fared no better, and he was denied relief by the Texas Court of Criminal Appeals.

Petitioner filed a petition for writ of habeas corpus in Federal District Court pursuant to 28 U.S.C. § 2254. Although petitioner raised four issues, we concern ourselves here with only petitioner's jury selection claim premised on *Batson*. The Federal Magistrate Judge who considered the merits **[330]** was troubled by some of the evidence adduced in the state-court proceedings. He, nevertheless, recommended, in deference to the state courts' acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, that petitioner be denied relief. The United States District Court adopted the recommendation. Pursuant to § 2253, petitioner sought a COA from the District Court, and the application was denied. Petitioner renewed his request to the Court of Appeals for the Fifth Circuit, and it also denied the COA.

The Court of Appeals noted that, under controlling habeas principles, a COA will issue "'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Miller-El v. Johnson*, 261 F.3d 445, 449 (2001) (quoting 28 U.S.C. § 2253(c)(2)). Citing our decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the court reasoned that "[a] petitioner makes a 'substantial showing' when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." 261 F.3d, at 449. The Court of Appeals also interjected the requirements of 28 U.S.C. § 2254 into the COA determination: "As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1)." 261 F.3d, at 451.

Applying this framework to petitioner's COA application, the Court of Appeals concluded "that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary." *Id.*, at 452. As a consequence, the court "determined that the state court's adjudication neither resulted in a decision that **[331]** was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court," *ibid.*; and it

denied petitioner's request for a COA. We granted certiorari. 534 U.S. 1122, 122 S.Ct. 981, 151 L.Ed.2d 963 (2002).

B

While a COA ruling is not the occasion for a ruling on the merit of petitioner's claim, our determination to reverse the Court of Appeals counsels us to explain in some detail the extensive evidence concerning the jury selection procedures. Petitioner's evidence falls into two broad categories. First, he presented to the state trial court, at a pretrial *Swain* hearing, evidence relating to a pattern and practice of race discrimination in the *voir dire*. Second, two years later, he presented, to the same state court, evidence that directly related to the conduct of the prosecutors in his case. We discuss the latter first.

A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

These numbers, while relevant, are not petitioner's whole case. During voir dire, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential **[332]** juror for cause or by peremptory challenge. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. To the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

> "[I]f those three [sentencing] questions are answered yes, at some point [,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death .. as the result of the verdict in this case if those three questions are answered yes." App. 215.

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us ... your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?" *Id.*, at 506.

There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. **[333]** *Huffman v. State*, 450 S.W. 2d 858, 861 (Tex. Crim. App. 1970), vacated in part, 408 U.S. 936, 92 S.Ct. 2860, 33 L.Ed.2d 753 (1972). This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of

36(94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" App. 509. In contrast, only one out of eight (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. The typical questioning of the other seven black jurors was as follows:

> "[Prosecutor]: Now, the maximum sentence for [murder] ... is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?
>
> "[Juror]: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> .....
>
> "[Prosecutor]: Again, we're not talking about self-defense or accident or insanity [1038] or killing in the heat of passion or anything like that. We're talking about the knowing--
>
> "[Juror]: I know you said the minimum. The minimum amount that I would say would be at least twenty years." *Id.*, at 226-227.

Furthermore, petitioner points to the prosecution's use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled. With no information about **[334]** the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Tex.Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp.2003). Shuffling affects jury composition because any prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported inadequacy of the card shuffle by a defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward.

Next, we turn to the pattern and practice evidence adduced at petitioner's pretrial *Swain* hearing. Petitioner subpoenaed a number of current and former Dallas County assistant district attorneys, judges, and others who had observed firsthand the prosecution's conduct during jury selection over a number of years. Although most of the witnesses denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the **[335]** District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the Dis-

trict Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

Some testimony casts doubt on the State's claim that these practices had been discontinued before petitioner's trial. For example, a judge testified that, in 1985, he had to exclude a prosecutor from trying cases in his courtroom for race-based discrimination in jury selection. Other testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire. *Id.*, at 788. Concerns over the exclusion of African-Americans by the District Attorney's Office were echoed by Dallas County's Chief Public Defender.

This evidence had been presented by petitioner, in support of his *Batson* claim, to the state and federal courts that denied him relief. It is against this background that we examine whether petitioner's case should be heard by the Court of Appeals.

II

A

As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and **[336]** obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ..." § 2253(c)(1). As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. "The COA statute establishes procedural

rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S., at 482, 120 S.Ct. 1595; *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). As the Court of Appeals observed in this case, § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack*, *supra*, at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484, 120 S.Ct. 1595 (quoting Barefoot, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based **[337]** on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances

where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383.

Our holding should not be misconstrued as directing that a COA always must issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners. *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("'AEDPA's purpose [is] to further the principles of comity, finality, and federalism' (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000))); *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion of O'CONNOR, J.). The concept of a threshold, or gateway, test was not the innovation of AEDPA. Congress established a threshold prerequisite to appealability in 1908, in large part because it was "concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process ...." *Barefoot, supra*, at 892, n. 3, 103 S.Ct. 3383. By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course.

[338] A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot, supra*, at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy

§ 2253 (c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

B

Since Miller-El's claim rests on a *Batson* violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson* and reaffirmed in our later precedents. *E.g., Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). Contrary to the state trial court's ruling on remand, the State now concedes that petitioner, Miller-El, satisfied step one: "[T]here is no dispute that Miller-El presented a prima facie claim" that prosecutors used their peremptory challenges to exclude venire members on the basis of race. Brief for Respondent 32. Petitioner, for his part, acknowledges that the State proceeded through step two by proffering facially race-neutral explanations for these strikes. Under *Batson*, then, the question remaining is step three: whether Miller-El "has carried his burden of proving purposeful discrimination." *Hernandez, supra*, at 359, 111 S.Ct. 1859.

As we confirmed in *Purkett v. Elem*, 514 U.S., at 768, 115 S.Ct. 1769, the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness **[339]** of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Ibid.* In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

In *Hernandez v. New York*, a plurality of the Court concluded that a state court's finding of the absence of discriminatory intent is "a pure issue of fact" accorded significant deference:

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21, 106 S.Ct. 1712. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)." 500 U.S., at 365, 111 S.Ct. 1859.

Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. "[I]f an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the **[340]** appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Id.*, at 367, 111 S.Ct. 1859.

In the context of direct review, therefore, we have noted that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be

overturned unless clearly erroneous. *Id.*, at 364, 111 S.Ct. 1859. A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2); see also *Williams*, 529 U.S., at 399, 120 S.Ct. 1495 (opinion of O'CONNOR, J.).

Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. In the context of the threshold examination in this *Batson* claim the issuance of a COA can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (in action under Title VII of the Civil Rights Act of 1964, employee's prima facie case and evidence that employer's **[341]** race-neutral response was a pretext can support a finding of purposeful discrimination). Only after a COA is granted will a reviewing court determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary. At this stage, however, we only ask whether the District Court's application of AEDPA deference, as stated in § § 2254(d)(2) and (e)(1), to peti-

tioner's Batson claim was debatable amongst jurists of reason.

C

Applying these rules to Miller-El's application, we have no difficulty concluding that a COA should have issued. We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.

This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable **[342]** requirement and applies to the granting of habeas relief rather than to the granting of a COA.

The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court

need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. Slack, 529 U.S., at 481, 120 S.Ct. 1595; *Hohn*, 524 U.S., at 241, 118 S.Ct. 1969. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

The case for debatability is not weakened when we examine the State's defense of the disparate treatment. The Court of Appeals held that "[t]he presumption of correctness is especially strong, where, as here, the trial court and state habeas court are one and the same." 261 F.3d, at 449. As we have noted, the trial court held its *Batson* hearing two years after the *voir dire*. While the prosecutors had proffered contemporaneous race-neutral justifications for many **[343]** of their peremptory strikes, the state trial court had no occasion to judge the credibility of these explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it. As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecutors explained

that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal of the prosecution's explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be "difficult" to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated; and four white jurors had family members with criminal histories. As a consequence, even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred.

[344] We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning. 261 F.3d, at 452 ("The findings of the state court that there was no disparate questioning of the *Batson* jurors ... [is] fully supported by the record"). Petitioner argues that the prosecutors' sole purpose in using disparate questioning was to elicit responses from the African-American venire members that reflected an opposition to the death penalty or an unwillingness to impose a minimum sentence, either of which justified for-cause challenges by the prosecution under the then applicable state law. This is more than a remote possibility. Disparate questioning did occur. Petitioner submits that disparate questioning created the appearance of divergent opinions even though the venire members' views on the relevant subject

might have been the same. It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination. *Batson*, 476 U.S., at 97, 106 S.Ct. 1712 ("Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose").

As a preface to questions about views the prospective jurors held on the death penalty, the prosecution in some instances gave an explicit account of the execution process. Of those prospective jurors who were asked their views on capital punishment, the preface was used for 53% of the African-Americans questioned on the issue but for just 6% of white persons. The State explains the disparity by asserting that a disproportionate number of African-American venire members expressed doubts as to the death penalty on their juror questionnaires. This cannot be accepted without further inquiry, however, for the State's own evidence is inconsistent **[345]** with that explanation. By the State's calculations, 10 African-American and 10 white prospective jurors expressed some hesitation about the death penalty on their questionnaires; however, of that group, 7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description.

There is an even greater disparity along racial lines when we consider disparate questioning concerning minimum punishments. Ninety-four percent of whites were informed of the statutory minimum sentence, compared to only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity. *Pierre v. Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536, 83 L.Ed. 757 (1939) ("'The fact that the testimony ... was not challenged by evidence appropriately direct, cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be

assumed that the State would have refrained from introducing it" (quoting *Norris v. Alabama*, 294 U.S. 587, 594-595, 55 S.Ct. 579, 79 L.Ed. 1074 (1935))). Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex.Crim.App.1989). It follows, in our view, that a fair interpretation of the record on this threshold examination in the COA analysis is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire. *Batson*, *supra*, at 93, 106 S.Ct. 1712 ("Circumstantial evidence of invidious intent may include proof of disproportionate impact... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'").

[346] We agree with petitioner that the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past. App. 788 (noting that a prosecutor admitted to requesting a jury shuffle "because a predominant number of the first six, eight or ten jurors were blacks"). Even though the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection.

Finally, in our threshold examination, we accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. Evidence presented at the *Swain* hearing indicates that African-Americans almost categorically were excluded from jury service. *Batson*, *supra*, at 94, 106 S.Ct. 1712 ("Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination' "); *Vasquez v. Hillery*, 474 U.S. 254, 259, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that 'chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more'" (quoting *Hill v. Texas*, 316 U.S. 400, 404, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942))); *Hernandez v. Texas*, 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed. 866 (1954) ("But it taxes our credulity to say that mere chance resulted in there being **[347]** no members of this class among the over six thousand jurors called in the past 25 years"). Only the Federal Magistrate Judge addressed the import of this evidence in the context of a *Batson* claim; and he found it both unexplained and disturbing. Irrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case. Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.

In resolving the equal protection claim against petitioner, the state courts made no mention of either the jury shuffle or the historical record of purposeful discrimination. We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it. This failure, however, does not diminish its significance. Our concerns here are heightened by the fact that, when presented with this evidence, the state trial court somehow reasoned that there was not even the inference of discrimination to support a prima facie case. This was clear error, and the State declines to defend this particular ruling. "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U.S., at 98, 106 S.Ct. 1712 (quoting Norris, 294 U.S., at 598, 55 S.Ct. 579).

[348] To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was "objectively unreasonable" in light of the record before the court. The State represents to us that petitioner will not be able to satisfy his burden. That may or may not be the case. It is not, however, the question before us. The COA inquiry asks only if the District Court's decision was debatable. Our threshold examination convinces us that it was.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion, but write separately for two reasons: First, to explain why I believe the Court's willingness to consider the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) limits on habeas relief in deciding whether to issue a certificate of appealability (COA) is in accord with the text of 28 U.S.C. § 2253(c). Second, to discuss some of the evidence on the State's side of the case--which, though inadequate (as the Court holds) to make the absence of a claimed violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), undebatable, still makes this, in my view, a very close case.

I

Many Court of Appeals decisions have denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits--without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right. See, *e.g.*, *Kasi v. Angelone*, 300 F.3d 487 (C.A.4 2002); **[349]** *Wheat v. Johnson*, 238 F.3d 357 (C.A.5 2001).[1] The Court today disapproves this approach, which improperly resolves the merits of the appeal during the COA stage. Ante, at 1036, 1039-1040. Less clear from the Court's opinion, however, is why a "circuit justice or judge," in deciding whether to issue a COA, must "look *to the District Court's application of AEDPA* to [a habeas petitioner's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason." *Ante*, at 1039 (emphasis added). How the district court applied AEDPA has nothing to do with whether a COA applicant has made "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), so the AEDPA standard should seemingly have no role in the COA inquiry.

Section 2253(c)(2), however, provides that "[a] certificate of appealability *may issue . . . only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphasis added.) A "substantial showing" *does not entitle* an applicant to a COA; it is a necessary and not a sufficient condition. Nothing in the text of § 2253(c)(2) prohibits a circuit justice or judge from imposing additional re-

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[1] In what can be regarded as a logical development from the error of analyzing a request for a COA like a merits appeal, some courts have simply allowed merits appeals to be taken *without* a COA--in flat contravention of . See, *e.g.*, *Bates v. Lee*, 308 F.3d 411 (C.A.4 2002).

quirements, and one such additional requirement has been approved by this Court. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (holding that a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but *also* must demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling).

The Court today imposes another additional requirement: A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his **[350]** constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. *Ante*, at 1039. To give an example, suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, *even if* the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of § 2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d). This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

II

In applying the Court's COA standard to petitioner's case, we must ask whether petitioner has made a substantial showing of a *Batson* violation and also whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA. The facts surrounding petitioner's *Batson* claims, when viewed in light of § 2254(e)(1)'s requirement that state-court factual determinations can be overcome only by clear and convincing evidence to the contrary, reveal this to be a close, rather than a clear, case for the granting of a COA.

Petitioner maintains that the following six African-American jurors were victims of racially motivated peremptory strikes: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carrol Boggess. As to each of them, the State proffered race-neutral explanations for its peremptory challenge. Five were challenged primarily because of their views on imposing the death penalty (**[351]** Rand, Kennedy, Bozeman, Warren, and Boggess), and one (Fields) was challenged because (among other reasons) his brother had been convicted of drug offenses and served time in prison. By asserting race-neutral reasons for the challenges, the State satisfied step two of *Batson*. See *Purkett v. Elem*, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). Unless petitioner can make a substantial showing that (*i.e.*, a showing that reasonable jurists could debate whether) the State fraudulently recited these explanations as pretext for race discrimination, he has not satisfied the requirement of § 2253(c) (2). Moreover, because the state court entered a finding of fact that the prosecution's purported reasons for exercising its peremptory challenges were not pretextual, App. 878, a COA should not issue unless that finding can reasonably be thought to be contradicted by clear and convincing evidence. See § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). *Ante*, at 1039.

The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white veniremen similarly situated to the six aforementioned African-American veniremen. Although petitioner claims that two white veniremen, Sandra Hearn and Marie Mazza, expressed views about the death penalty as ambivalent as those expressed by Rand, Kennedy, Bozeman, Warren, and Boggess, the *voir dire* transcripts do not clearly bear that

out. Although Hearn initially stated that she thought the death penalty was inappropriate for first-time offenders, she also said, "I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty." App. 694. She further stated that someone who was an extreme child abuser deserved the death penalty, whether or not it was a first-time offense. Reply Brief for Petitioner 14a. Hearn also made pro-prosecution statements about her distaste for criminal **[352]** defendants' use of psychiatric testimony to establish incompetency. *Id.*, at 17a. As for Mazza, her stated views on the death penalty were as follows: "It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that--a decision that I think I could make one way or the other." App. 519.

Compare those statements with the sentiments expressed by the challenged African-American veniremen. Kennedy supported the death penalty only in cases of mass murder. "Normally I wouldn't say on just the average murder case--I would say no, not the death sentence." *Id.*, at 216. Bozeman supported the death penalty only "if there's no possible way to rehabilitate a person ... I would say somebody mentally disturbed or something like that or say a Manson type or something like that." *Id.*, at 79. When asked by the prosecutors whether repeated criminal violent conduct would indicate that a person was beyond rehabilitation, Bozeman replied, "No, not really." *Ibid.* Warren refused to give any clear answer regarding his views on the death penalty despite numerous questions from the prosecutors. *Id.*, at 139-140 ("Well, there again, it goes back to the situation, you know, sometimes",; *id.*, at 140. When asked whether the death penalty accomplishes anything, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't [sic]. Sometimes you have mixed feelings about things like that." *Ibid.* When asked, "What do you think it accomplishes when you feel it does?," Warren replied, "I don't know." *Ibid.* Boggess referred to the death penalty as "murder," *id.*, at 197, and said, "whether or not I could actually go through with murder--with killing another

person or taking another person's life, I just don't know. I'd have trouble with that," *ibid.* Rand is a closer case. His most ambivalent statement was "Can I do this? You know, right now I say I can, but tomorrow I might not." *Id.*, at 161 (internal quotation marks omitted). Later on **[353]** Rand did say that he could impose the death penalty as a juror. *Id.*, at 162-164. But Hearn and Mazza (the white jurors who were seated) also said that they could sit on a jury that imposed the death penalty. At most, petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza. That perhaps would have been enough to permit the state trial court, deciding the issue *de novo* after observing the demeanor of the prosecutors and the disputed jurors, to find a *Batson* violation. But in a federal habeas case, where a state court has previously entered factfindings that the six African-American jurors were not challenged because of their race, petitioner must provide "clear and convincing evidence" that the state court erred, and, when requesting a COA, must demonstrate that jurists of reason could debate whether this standard was satisfied. *Ante*, at 1039.

Fields, the sixth African-American venireman who petitioner claims was challenged because of his race, supported capital punishment. However, his brother had several drug convictions and had served time in prison. App. 124. Warren and Boggess, two of the African-American veniremen previously discussed, also had relatives with criminal convictions--Warren's brother had been convicted of fraud in relation to food stamps, *id.*, at 153, and Boggess had testified as a defense witness at her nephew's trial for theft, *id.*, at 211, and reported in her questionnaire that some of her cousins had problems with the law, Joint Lodging 43. Of the four white veniremen who petitioner claims also had relatives with criminal histories and therefore "should have been struck" by the prosecution--three (Noad Vickery, Cheryl Davis, and Chatta Nix) were actually so pro-prosecution that *they were struck by the petitioner*. *Id.*, at 111. The fourth, Joan Weiner, had a son who had shoplifted at the age

of 10. App. 511. That is hardly comparable to Fields's situation, and Weiner was a strong State's juror for **[354]** other reasons: She had relatives who worked in law enforcement, *id.*, at 510, and her support for the death penalty was clear and unequivocal, id., at 506, 511.

For the above reasons, my conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible.

With these observations, I join the Court's opinion.

Justice THOMAS, dissenting.

Unpersuaded by petitioner's claims, the state trial court found that "there was no purposeful discrimination by the prosecut[ion] in the use of ... peremptory strikes," App. 878. This finding established that petitioner had failed to carry his burden at step three of the inquiry set out in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Title 28 U.S.C. § 2254(e)(1) requires that a federal habeas court "presum[e]" the state court's findings of fact "to be correct" unless petitioner can rebut the presumption "by clear and convincing evidence." The majority decides, without explanation, to ignore § 2254(e)(1)'s explicit command. I cannot. Because petitioner has not shown, by clear and convincing evidence, that any peremptory strikes of black veniremen were exercised because of race, he does not merit a certificate of appealability (COA). I respectfully dissent.

I

A

The Court agrees, *ante*, at 1042, that the state court's finding at step three of *Batson* is a finding of fact ordinarily subject to § 2254(e)(1)'s presumption of correctness:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual **[355]** issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

However, the Court implicitly rejects the obvious conclusion that the COA determination under § 2253(c) is part of a "proceeding instituted by an application for a writ of habeas corpus." Instead of presuming the state court's fact-findings to be correct, as § 2254(e)(1) requires, the Court holds that petitioner need only show that reasonable jurists could disagree as to whether he can provide clear and convincing evidence that the finding was erroneous. *Ante*, at 1041.

The Court's main justification for this conclusion is supposed fidelity to *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See *ante*, at 1040 ("'The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong' " (quoting *Slack*, *supra*, at 484, 120 S.Ct. 1595)). But neither *Slack* nor any other decision of this Court addressing the COA procedure has ever considered a "constitutional claim" that turns entirely on issues of fact. In these circumstances, it is the text of § 2254(e)(1) that governs.

Unlike the majority, I begin with the plain text of the statute that instructs federal courts how to treat state-court findings of fact. At issue is what constitutes a "proceeding" for purposes of § 2254(e)(1). The word, "proceeding," means "[t]he regular and orderly progression of a lawsuit, including *all acts and events between* the time of commencement and the entry of judgment." Black's Law Dictionary 1221 (7th ed.1999) (emphasis added). The COA, "standing alone, ... does not assert a grievance against anyone, does not seek remedy or redress for any legal injury, and does not even require a 'party' on the other side. It is nothing more than a request for permission to seek review." *Hohn v. United States*, 524 U.S. 236, 256, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (SCALIA, J., dissenting).

[356] I agree with the majority that the existence of a COA is a jurisdictional prerequisite to the merits appeal.

Ante, at 1039. However, the Court takes a wrong turn when it implies that the merits appeal is part of the habeas process (or "proceeding") but the COA determination somehow is not. Overwhelming authority (including the majority opinion) confirms that § 2254(e)(1) applies to the merits appeal. See *ante*, at 1042; *Weaver v. Bowersox*, 241 F.3d 1024, 1030 (C.A.8 2001); *Putman v. Head*, 268 F.3d 1223, 1241 (C.A.11 2001); *Johnson v. Gibson*, 254 F.3d 1155, 1160 (C.A.10 2001); *Francis S. v. Stone*, 221 F.3d 100, 114-115 (C.A.2 2000); *Weeks v. Snyder*, 219 F.3d 245, 258 (C.A.3 2000); *Mueller v. Angelone*, 181 F.3d 557, 575 (C.A.4 1999); *Ashford v. Gilmore*, 167 F.3d 1130, 1131 (C.A.7 1999); cf. *Sumner v. Mata*, 449 U.S. 539, 546-547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (pre-Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) factual deference provision with virtually identical language applies to merits appeal). The COA determination should be treated no differently, because § 2254(e)(1) draws no distinction between the merits appeal and the COA. The Court's silent conclusion to the contrary is simply illogical. The COA's status as the jurisdictional prerequisite for the merits appeal requires that both the COA determination *and* the merits appeal be considered a part of the same "proceeding."

The Court's rejection of this conclusion also conflicts with pre-AEDPA practice. Prior to AEDPA, access to a merits appeal in federal habeas corpus proceedings was governed by a mechanism similar to the COA, known as a certificate of probable cause, or CPC. See *Slack*, *supra*, at 480, 120 S.Ct. 1595. There was also a standard of factual deference similar to, though weaker than, the standard in § 2254(e)(1). See 28 U.S.C. § 2254(d) (1994 ed.).[2] Under

[2] The pre-AEDPA standard of factual deference provided:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit [enumerated exceptions omitted].... And in an evidentiary hearing ... the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

these provisions (indistinguishable **[357]** from AEDPA's for these purposes), courts concluded that § 2254(e)(1)'s predecessor applied directly to the CPC proceeding, without any filtering through the "debatability" standard the Court has used in both the CPC and COA contexts. See, *e.g.*, *Barnard v. Collins*, 13 F.3d 871, 876-877 (C.A.5 1994); *Cordova v. Collins*, 953 F.2d 167, 169 (C.A.5 1992). These cases support the straightforward notion that § 2254(e)(1), like its predecessor did with respect to CPC proceedings, applies directly to the COA proceeding.

The Court's decision in *Hohn*, *supra*, which holds that the COA determination constitutes a "case" in the court of appeals for purposes of this Court's jurisdiction under 28 U.S.C. § 1254, is not to the contrary. *Hohn* does not hold, nor does its logic require, that the COA determination be regarded as separate from the rest of the habeas proceeding. In fact, *Hohn* rejected the proposition that "a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits (3)27." 524 U.S., at 246, 118 S.Ct. 1969 (emphasis added). Indeed, *Hohn* analogized the COA to the filing of a notice of appeal, *id.*, at 247, 118 S.Ct. 1969, which in the civil context all would consider to be part of the same "proceeding" ("instituted by" a complaint) as the trial and merits appeal.

B

The Court also errs, albeit in dicta, when it implies that delayed state factfinding--here the two years between *voir dire* and the post-trial *Batson* hearing[3]--is an excuse for **[358]** weakened factual deference. *Ante*, at 1042. Even putting aside the fact that an appellate court on direct review should (and would) still give heavy deference to 2-year-old

[3] Not all the factfinding was so hindered. Prosecutors gave reasons for 2 of the 10 strikes of black veniremen at the post-trial *Batson* hearing. One of those, Joe Warren, is at issue here. App. 856-860.

credibility findings,[4] this reasoning is in tension with the plain text of § 2254(e)(1) and ignores changes wrought by AEDPA to the role of federal courts on collateral review.

Unlike an appellate court's review of district court findings of fact for clear error, § 2254(e)(1) establishes a presumption of correctness. It requires that the federal habeas court assume the state court that entered the findings was the best placed factfinder with the most complete record and *only then* ask whether the petitioner can refute that factual finding by clear and convincing evidence. Procedural imperfections ordinarily will not affect this presumption; thus, it does not matter whether the state judge made his decision two years late or with a less-than-perfect record. Admittedly these conditions might increase the *odds* that a habeas applicant could locate helpful evidence, but to "presume" facts "correct" means a court cannot allow a habeas applicant to evade § 2254(e)(1) by attacking the process employed by the state *factfinder* rather than the actual *factfindings*.

This reading is confirmed by the changes worked by AEDPA. Section 2254(e)(1) does not, as its predecessor did, create exceptions to factual deference for procedural infirmities. For example, prior to AEDPA, a federal habeas court **[359]** would not defer to state-court determinations of fact if " the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U.S.C. § 2254(d)(2) (1994 ed.), "the material facts were not adequately developed at the State court hearing," § 2254(d)(3),

[4] I am puzzled by the majority's willingness to hold against *respondent* the failure of prosecutors to testify at the post-trial *Batson* hearing. *Petitioner* could easily have requested that the reasons for the allegedly unconstitutional peremptory strikes be given again, and did not. The attorney representing the State at the post-trial *Batson* hearing made certain that both trial prosecutors were present to reiterate the reasons they gave in the record for striking the challenged black veniremen. App. 865. Petitioner's counsel explicitly refused the opportunity to do so when it was offered. *Ibid.* Furthermore, I fail to understand why a move that resulted in a more efficient hearing without redundant testimony should redound to the benefit of petitioner, who bears the burden of proof in this federal habeas corpus proceeding.

or "the applicant did not receive a full, fair, and adequate hearing," § 2254(d)(6). The removal of these exceptions forecloses the use of marginal procedural complaints--such as a delay between *voir dire* and a *Batson* hearing--to determine whether or "how much" a federal habeas court will defer to state-court factfinding.

Section 2254(e)(1) simply cannot be read to contain an implied sliding scale of deference. I do not understand the Court to disagree with this view, however, as its dicta does not actually purport to interpret the text of § 2254(e)(1).[5]

II

Because § 2254(e)(1) supplies the governing legal standard, petitioner must provide "clear and convincing" evidence of purposeful discrimination in order to obtain a COA. Petitioner's constitutional claim under *Batson* turns on this fact and "reasonable jurists could debate," *ante*, at 1039 (internal **[360]** quotation marks omitted), whether a Batson violation occurred only if petitioner first meets his burden under § 2254(e)(1). And the simple truth is that petitioner has not presented anything remotely resembling "clear and convincing" evidence of purposeful discrimination.

[5] I do, however, agree with the majority that the Court's decisions in *Hernandez v. New York*, 500 U.S.,352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett v. Elem*, 514 U.S.765, 115 S.Ct. 1769, 131 .Ed.2d 834 (1995) *(per curiam)*, can be helpful in guiding a federal habeas court deciding a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For instance, both cases confirm that *Batson* step three turns on an evaluation of the prosecutor's proffered race-neutral justifications for the peremptory challenges at issue. *Purkett*, *supra* at 768-769, 115 S.Ct. 1769; *Hernandez*, 500 U.S., at 364-365, 111 S.Ct. 1859 (plurality opinion); *id.*, at 372, 111 S.Ct. 1859 (O'CONNOR, J., concurring in judgment); see also *Batson*, *supra* Additionally, because *Hernandez's* clear error standard is less demanding of a criminal defendant than is of a habeas applicant, a federal habeas court can deny relief on § 2254(e)(1) grounds if it determines it would do so when reviewing the same facts for clear error. Cf. *Marshall v. Lonberger*, 459 U.S. 422, 434-435, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) ("We greatly doubt that Congress ... intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself ").

A

The evidence amassed by petitioner can be grouped into four categories: (1) evidence of historical discrimination by the Dallas District Attorney's office in the selection of juries; (2) the use of the "jury shuffle" tactic by the prosecution; (3) the alleged similarity between white veniremen who were not struck by the prosecution and six blacks who were: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carroll Boggess; and (4) evidence of so-called disparate questioning with respect to veniremen's views on the death penalty and their ability to impose the minimum punishment.

The "historical" evidence is entirely circumstantial, so much so that the majority can only bring itself to say it "casts doubt on the State's claim that [discriminatory] practices had been discontinued before petitioner's trial." *Ante*, at 1038. And the evidence that the prosecution used jury shuffles no more proves intentional discrimination than it forces petitioner to admit that he sought to eliminate whites from the jury, given that he employed the tactic even more than the prosecution did.[6] Ultimately, these two categories of evidence do very little for petitioner, because they do not address the genuineness of prosecutors' proffered race-neutral reasons for making the peremptory strikes of these particular jurors.

In short, the reasons that Justice SCALIA finds this to be a "close case," *ante*, at 1045 (concurring opinion), are reasons that, under the correct reading of § 2254(e)(1), it is a *losing* **[361]** case. I write further to explore two arguments advanced by petitioner that the Court deemed helpful in establishing petitioner's "debatable" entitlement to re-lief, apparently because the majority's "debatability" inquiry requires a less-thorough review of the record and a more permissive attitude toward a COA movant's representations.

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[6] Petitioner shuffled the jury five times; the prosecution did so only three times. Brief for Respondent 21.

B

As noted, petitioner argues the prosecution struck six blacks--Rand, Kennedy, Bozeman, Fields, Warren, and Boggess--who were similarly situated to unstruck whites. I see no need to repeat Justice SCALIA's dissection of petitioner's tales of white veniremen as ambivalent about the death penalty as Kennedy, Bozeman, Warren, and Boggess. *Ante*, at 1046-1048 (concurring opinion). However, the majority's cursory remark that "three of the State's proffered race-neutral rationales for striking [black] jurors pertained *just as well to some white jurors who were not challenged and who did serve on the jury*," *ante*, at 1043 (emphasis added), is flatly incorrect and deserves some discussion.

For the three challenged peremptory strikes used on Fields, Warren, and Boggess, petitioner has not even correctly alleged the existence of "similarly situated" white veniremen. The majority's discussion of this subject is misleading, stating that "prosecutors explained that their peremptory challenges against six [black] potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the [veniremens'] own family history of criminality." *Ibid.* The implication is that for each of the six challenged veniremen, the prosecution gave all three reasons as justifications for the use of a peremptory strike. To clarify: Rand, Kennedy, Bozeman, Warren, and Boggess were struck for ambivalence about the death penalty. Fields, Warren, and Boggess were struck for having family members **[362]** with criminal histories. Bozeman and Fields were struck for making prodefense remarks about rehabilitation.

Simple deduction, and an analysis of petitioner's contentions that includes the *names* of these allegedly similar white veniremen, compare *ibid.*, reveals that petitioner has unearthed no white venireman who, like Warren and Boggess, was *both* ambivalent about the death penalty *and* re-

lated to individuals who had previous brushes with the law.[7] Petitioner also produces no white venireman who, like Fields, expressed prodefense views on rehabilitation and had a family member with a criminal history.[8] "Similarly situated" **[363]** does not mean matching any one of several reasons the prosecution gave for striking a potential juror--it means matching all of them.

This leaves Rand, Kennedy, and Bozeman.[9] Petitioner alleges that white jurors Hearn and Mazza were as ambiva-

[7] Petitioner directs the Court to white veniremen Noad Vickery, Cheryl Davis, Chatta Nix, and Joan Weiner as having family members with criminal histories, but points to white veniremen Sandra Hearn and Marie Mazza as equally ambivalent about the death penalty. Brief for Petitioner 22. Of course, as Justice SCALIA demonstrates, Hearn and Mazza were *not* ambivalent about the death penalty. *Ante*, at 1047 (concurring opinion).

[8] Again petitioner points to Vickery, Davis, Nix, and Weiner for similar family histories. Justice SCALIA has shown that none of these four were in fact similarly situated to Fields with respect to this justification. *Ante*, at 1048 (concurring opinion). Petitioner also alleges that Hearn made prodefense remarks about rehabilitation similar to those made by Fields. Again, no white venireman even allegedly fits *both* reasons given for striking Fields. Furthermore, even if Fields had only been struck for his views on rehabilitation, those views were in no way equivalent to those expressed by Hearn. Fields answered "yes" to the question whether he believed that "everyone can be rehabilitated." App. 118. Fields went on to say that "[i]t may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation." *Ibid.* In contrast, Hearn stated that she "believe[d] in the death penalty if a criminal cannot be rehabilitated." *Id.*, at 694.

Petitioner tries to muddy the waters by pointing out that Fields was, in other respects, a good State's juror because he supported the death penalty. Brief for Petitioner 24-25. However, that does not change the fact that Fields said that everyone could be rehabilitated (and thus might have been swayed by a penitent defendant's testimony) and Hearn insisted that some people could not be rehabilitated. In analyzing *Batson* claims the focus should not be on the "*reasonableness* of the asserted nonracial motive ... [but] rather [on] the *genuineness* of the motive." *Purkett*, 514 U.S., at 769, 115 S.Ct. 1769 (emphasis in original).

[9] The prosecution's stated reasons for striking Bozeman were that he was ambivalent about the death penalty and that he made prodefense

lent about the death penalty as these three struck black veniremen. Justice SCALIA has adequately demonstrated that this is absurd with respect to Kennedy and Bozeman, but I agree that petitioner makes a slightly better case with Rand. Ante, at 1048 (concurring opinion). However, since the burden is on petitioner to show, by clear and convincing evidence, that Rand was struck because of his race, I find this sliver of evidence, even when combined with petitioner's circumstantial evidence, insufficient to rebut § 2254(e)(1)'s presumption.

C

Petitioner's accounts of "disparate questioning" also amount to little of substance. Petitioner argues that the prosecution posed different questions at *voir dire* depending on the race of the venireman on two subjects: the death penalty and the minimum punishment allowed under law. Neither accusation can withstand a careful examination of the full record or help petitioner assemble the requisite clear and convincing evidence.

[364] 1

Respondent counters petitioner's complaints about the so-called "graphic formulation" or "script" by arguing that this depiction was used only with those potential jurors who "expressed reservations about the death penalty in their juror questionnaires." Brief for Respondent 17. The majority discounts this explanation, stating that "[t]his cannot be accepted without further inquiry." *Ante*, at 1043. Under my view, however, petitioner bears the burden of showing purposeful discrimination by clear and convincing evidence.

The Court's treatment of this issue focuses on the apparent disparity in treatment of 10 black veniremen and 10

remarks about rehabilitation. This is one case where the prosecution gave multiple reasons for a strike and petitioner actually correctly *alleged* the existence of a similarly situated white venireman, Hearn. Petitioner believes, albeit erroneously, see *ante*, at 1047-1048 (SCALIA, J., concurring), that Hearn expressed similar ambivalence about the death penalty *and* made prodefense remarks about rehabilitation.

white veniremen who were supposedly similar in their opposition to the death penalty. The majority notes that only 2 out of these 10 whites got the graphic description while 7 out of 10 blacks did. *Ante*, at 1043-1044. But the Court neglects to mention that the eight white veniremen who petitioner thinks should have received the graphic formulation, Reply Brief for Petitioner 15, n. 19, were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue. No trial lawyer would willingly antagonize a potential juror ardently opposed to the death penalty with an extreme portrait of its implementation. The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not.

The record demonstrates that six of these eight white veniremen were so opposed to the death penalty that they were stricken for cause without the need for the prosecution to spend a peremptory challenge. For example, John Nelson wrote on his questionnaire, "I believe that the State does not have the right to take anyone's life," Tr. of Voir Dire in No. F85-78668-NL (5th Crim. Dist. Ct., Dallas County, Tex.), p. 625 (hereinafter VDR) (internal quotation marks omitted), and testified flatly, "I would not be able to vote for the death **[365]** penalty."[10] *Id.*, at 614. Nelson was struck for cause. *Id.*, at 662-663. Linda Berk was "always" opposed to the death penalty, *id.*, at 1449, and felt so strongly on the subject that the prosecutor remarked upon her discomfort, after which she stated, "[y]ou're going to have to excuse me because I'm getting a little emotional, okay?" *Id.*, at 1445. Later, after she had begun crying, Berk was struck for cause. *Id.*, at 1478. Gene Hinson stated curtly, "I put on the form there that I didn't agree with it," *id.*, at 1648, and was struck for cause. Sheila White said, "I have always been

[10] Nelson was also a doctor and presumably did not need to have the lethal injection process described to him.

against ... the death penalty," *id.*, at 2056, and was struck for cause.

Even those two not struck for cause had firm views. Margaret Gibson said: "I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything," *id.*, at 485, and was struck by the prosecution with a peremptory strike. And James Holtz thought the death penalty appropriate only if a policeman or fireman was murdered. *Id.*, at 1021. I can apprehend simply no reason to fault the prosecution for failing to give a more graphic description of lethal injection to prospective jurors with such firm views against capital punishment.

I recognize that these *voir dire* statements only indirectly support respondent's explanation because the graphic script was typically given at the outset of *voir dire*--before the above quoted veniremen had the chance to give their stark answers. Nevertheless, all available evidence supports respondent's view that those who were unclear in their views on the death penalty *in their juror questionnaires* received the graphic formulation--and that those who were adamantly for *or against* the death penalty in their questionnaires did not.

The jury forms at issue asked two questions directly relevant to the death penalty. Question 56 asked, "Do you believe in the death penalty?," offered potential jurors the **[366]** chance to circle "yes" or "no," and then asked them to "[p]lease explain your answer." See, *e.g.*, Joint Lodging 44 (Boggess questionnaire). Question 58 allowed potential jurors to circle "yes" or "no" in answering the following question: "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" *Ibid.*

First, as already noted, the deeper and clearer opposition to the death penalty on the part of the eight whites who did not receive the graphic script (but petitioner thinks should have) indirectly supports respondent's contention that this opposition came out in their questionnaires (pre-

sumably by an answer of "no" to question 56 and an answer of "yes" to question 58). But this is not the only evidence supporting respondent's view. Hinson, a white venireman who did not receive the graphic formulation, stated during *voir dire* that he "put on the form there that [he] didn't agree with [the death penalty] for both moral and religious reasons." VDR 1648. Similarly, Nelson, a white venireman not receiving the graphic formulation, stated on his questionnaire, "I believe that the State does not have the right to take anyone's life." *Id.*, at 625 (internal quotation marks omitted). Fernando Gutierrez, a juror who received the graphic formulation, answered "yes" to question 56, but also "yes" to question 58, indicating he had "moral, religious, or personal beliefs" that would obstruct his voting for the death penalty despite the fact that he believed in it. Joint Lodging 205.

The prosecution treated the black veniremen no differently. The blacks who did not receive the graphic formulation (whose questionnaires are contained in the record) all answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs wouldn't prevent them from imposing a death sentence. See *id.*, at 12 (Bozeman), 20 (Fields), 28 (Warren), 36 **[367]** (Rand). The black veniremen who were given the graphic formulation, by contrast, gave ambiguous answers on their juror questionnaires expressing hesitation, rather than philosophical opposition, to the death penalty. Boggess answered "yes" to question 56 but also "yes" to question 58. *Id.*, at 44. Kennedy answered "yes" to question 56 but indicated that he believed in the death penalty "[o]nly in extreme cases, such as multiple murders." *Id.*, at 51. Troy Woods answered "no" to question 56, but also "no" to question 58, indicating he *did not* believe in the death penalty but would have no personal objection to imposing it. *Id.*, at 180. He wrote "that *[sic]* not punishment," in the space provided for question 56. *Ibid.* It happened that, while not completely clear about it in the questionnaire (and hence receiving the graphic formulation), Woods was an enthusiastic supporter of the death penalty, and he was, in fact, seated on petitioner's jury. Further confirming respondent's explanation, black veniremen Linda Baker, Janice Mackey, Paul Bailey, and Anna Keaton all gave unclear responses to questions 56 and 58 and all received the graphic formulation. See Tr. of Pretrial Hearings in No. F85-78660-NL (5th Crim. Dist. Ct., Dallas County, Tex.) (Def.Exh. 7).[11]

[368] To sum up, the correlation between questionnaire answers and the use of the graphic script is far stronger than any correlation with race. Sixteen veniremen clearly indicated on the questionnaires their feelings on the death penalty,[12] and 15 of them did not receive the graphic script.[13] Eight veniremen gave unclear answers and those eight veniremen got the graphic script.[14] In other words, for 23 out of 24, or 96%, of the veniremen for whom questionnaire information is available, the answers given accurately predict

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[11] Questions 56 and 58, and the responses thereto, are found on page 6 of each questionnaire. Baker did not circle "yes" or "no" in answering question 56, but wrote "[m]y strongest feeling is against the death penalty; *however, being aware of the overcrowding in jails and the number of murders[,] I would have to know the facts to make a decision....*" (Emphasis added.) Baker also did not answer question 58, writing "undecided" instead. Mackey answered question 56 "no," indicating she did not believe in the death penalty, and wrote "Thou Shall Not Kill" in the explanation space. She then proceeded to answer question 58 "no" as well. Bailey circled "yes" in answering question 56, but wrote in "NO" with a circle around it, along with such explanations as "yes for a major crime" and "[n]o *one* have [sic] the right to take *anothe [sic]* ones *[sic]* life." (Emphases in original.) He then circled "no" in answering question 58. Keaton circled "no," indicating she did not believe in the death penalty, when she answered question 56, writing "It's not for me to punished *[sic]* anyone." However she then circled "no" in answering question 58, indicating that she did not have any objection to imposing the death penalty.

[12] See VDR 1648 (Hinson), 625 (Nelson); Joint Lodging 12 (Bozeman), 20 (Fields), 28 (Warren), 36 (Rand), 125 (Mary Sumrow), 132 (Ronnie Long), 140 (Weiner), 148 (Mazza), 156 (Vivian Sztybel), 164 (Debra McDowell), 172 (Kevin Duke), 189 (Brenda Walsh), 197 (Filemon Zablan), 213 (Hearn).

[13] Sztybel received the graphic script. VDR 2828.

[14] Boggess, Kennedy, Baker, Mackey, Bailey, Keaton, Gutierrez, and Woods.

whether they got the graphic script.[15] Petitioner's theory that race determined whether a venireman got the graphic script produces a race-to-script correlation of only 74%--far worse.[16]

2

Petitioner fares no better with his allegation that the prosecution employed two different scripts on the basis of [369] race when asking questions about imposition of the minimum sentence. Indeed, this disparate questioning argument is as flawed as the last one. Respondent admits that the different questioning on minimum sentences was used as an effort to get veniremen the prosecution felt to be ambivalent about the death penalty dismissed for cause. In making the decision whether to employ the "manipulative" minimum punishment script, prosecutors could rely on both the questionnaires and substantial voir dire testimony, as the minimum punishment questioning occurred much later in *voir dire* than the graphic formulation.

Seven black veniremen were given the allegedly "manipulative" minimum punishment script, all of whom were opposed to the death penalty in varying degrees. Rand, Kennedy, Bozeman, Warren, and Boggess' views on the death penalty have all been exhaustively discussed. This leaves Baker and Fields. Baker's views on the death penalty were so clearly ambivalent that she is not even the subject

[15] This analysis considers Hinson and Nelson as being clearly opposed to the death penalty in their questionnaires (answering question 56 "no" and question 58 "yes") and Kennedy as being ambiguous (though in fact he answered question 56 "yes" and 58 "no"). Even without these assumptions, 13 out of 15 veniremen who answered "yes" to question 56 and "no" to question 58--indicating clear support for the death penalty--did not receive the graphic script. And seven out of seven of those answering "no" and "no" or "yes" and "yes"--indicating ambiguous or mixed feelings about the death penalty--or not answering clearly at all received the graphic script. This yields an accuracy rate of 20 out of 22, or 91%.

[16] For whites, 10 out of 12 did not get the graphic script. For blacks, 7 out of 11 did get the graphic script. This means race predicted use of the graphic script only 74% of the time.

of petitioner's *Batson* challenge. And Fields' family history of criminality and views on rehabilitation, as earlier discussed, *supra*, at 1053, and n. 7, convinced the prosecution to use a peremptory strike.[17] Finally, petitioner's objection to the prosecution's decision not to use the "manipulative" punishment script on Woods, Reply Brief for Petitioner 17, n. 23, makes no sense. Woods gave answers indicating he would be an excellent State's juror--why would the prosecution have tried to eliminate him? Of course, if petitioner were correct that the prosecution sought to eliminate blacks then one might expect that all methods, including the use of the "manipulative" script, would have been deployed against Woods, who happened to also be black.

As with graphic questioning, respondent's explanation goes unrebutted by petitioner. Unless a venireman indicated he would be a poor State's juror (using the criteria that 370 respondent has identified here) *and would not otherwise be struck for cause or by agreement*, there was no reason to use the "manipulative" script. Thus, when petitioner points to the "State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty," *ibid.*, he ignores the fact that of the 10 whites who expressed opposition to the death penalty, 8 were struck for cause or by agreement, *meaning no "manipulative" script was necessary to get them removed.* The other two whites were both given the "manipulative" script and peremptorily struck,[18] just like Rand, Kennedy, Bozeman, Fields, Warren, Boggess, and Baker.

Quite simply, petitioner's arguments rest on circumstantial evidence and speculation that does not hold up to a thorough review of the record. Far from rebutting § 2254(e)(1)'s presumption, petitioner has perhaps not even demonstrated that reasonable jurists could debate whether

[17] The prosecution in fact used peremptory strikes on all seven of these black veniremen.

[18] See Joint Lodging 110; VDR 502-511 (Gibson), 1046-1050 (Holtz).

he has provided the requisite evidence of purposeful discrimination--but that is the majority's inquiry, not mine. Because petitioner has not demonstrated by clear and convincing evidence that even one of the peremptory strikes at issue was the result of racial discrimination, I would affirm the denial of a COA.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[FILED 07/24/00]

00-10784

THOMAS JOE MILLER-EL,
Petitioner-Appellant,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/00	Death penalty case docketed. NOA filed by Appellant Thomas Joe Miller-El [00-10784] (mrw)
7/24/00	Criminal Justice Act 20 voucher issued to Andrew A Hammel for Appellant Thomas Joe Miller-El . (00-10784 (jar)
7/24/00	Criminal Justice Act 20 voucher issued to James William Marcus for Appellant Thomas Joe Miller-El . [00-10784] (jar)
8/4/00	Appearance form filed by Ann Kraatz for Appellee Gary L Johnson. [00-10784] (mrw)
8/7/00	Transcript order received from Appellant Thomas Joe Miller-El for Court Reporter Janet Wright. Date of Hearing: 4/28/00. [00-10784] Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 8/22/00 for Janet Wright (mrw)

DATE	PROCEEDINGS
8/10/00	Appearance form filed by James William Marcus for Appellant Thomas Joe Miller-El. [00-10784] (mrw)
8/17/00	District Court Order - COA denied. Date Denied: 8/14/00 [00-10784] Awaiting DC Action ddl satisfied. (mrw)
8/24/00	Transcript order acknowledgment received from Court Reporter Janet Wright. Estimated pages: 35 Date Financial Arrangements Made: 8/4/00 [00-10784] Ct. Reporter Acknowledgement ddl satisfied. Transcript due on 9/5/00 for Janet Wright. Ct. Reporter Discount Date is 10/4/00 for Janet Wright. (mrw)
8/30/00	Record on appeal filed. Vol(s) of Pleadings: 13 Exhibits: 4 Boxes (Containing 11 folders of SCP) SEALED: 2 Envelopes. (1 Contains Volume #4) and (1 Contains Exhibits) [00-10784] (mrw)
10/18/00	Discount of 10 percent invoked for Court Reporter Janet Wright [00-10784] Transcript ddl updated to 11/6/00 for Janet Wright. Ct. Reporter Discount Date updated to 11/6/00 for Janet Wright. (mrw)
11/3/00	Supplemental record on appeal filed. Supplement #: 1 Vol(s) of Transcripts: 1 [00-10784] Transcript Deadline Satisfied. Court Reporter Discount Date Cancelled. (mrw)
11/6/00	BR-7 Letter issued to parties since COA denied in District Court. [00-10784] Motion for COA due on 12/18/00 for Thomas Joe Miller-El. Brief in Support of COA due on 12/18/00 for Thomas Joe Miller-El. (mrw)
11/7/00	Record on appeal released to attorney James William Marcus for Appellant Thomas Joe Miller-El. Volumes: 12 (Vols 1-3 & 5-13, only) Supplemental Volumes: 1. [00-10784] (lrc)

DATE	PROCEEDINGS
12/1/00	Extension granted by phone until: 1/17/01 to file Motion for COA & Brief in Support for Appellant Thomas Joe Miller-El. [00-10784] (mrw)
12/4/00	Confirmation letter filed by Appellant Thomas Joe Miller-El confirming an extension of time to and including 1/17/01 for filing Motion for COA & Brief. [00-10784] Motion due ddl updated to 1/17/01 for Thomas Joe Miller-El. Brief in Support ddl updated to 1/17/01 for Thomas Joe Miller-El. (mrw)
12/5/00	Attorney motion filed by James William Marcus for Appellant Thomas Joe Miller-El to substitute counsel Elizabeth Detweiler for Andrew Hammel [3073649-1] [00-10784] (mrw)
12/8/00	COURT Order filed granting attorney motion to substitute counsel [3073649-1] (attorney Andrew A Hammel for Thomas Joe Miller-El terminated) Atty added: Elizabeth Detweiler (HRD) Copies to all counsel. [00-10784] (mrw)
12/12/00	Criminal Justice Act 20 voucher issued to Elizabeth Detweiler for Appellant Thomas Joe Miller-El . [00-10784] (jar)
1/10/01	Motion filed by Appellant Thomas Joe Miller-El to file brief in support of COA in excess of the word count limitation but not to exceed 28,000 words. [3106144-1] [00-10784] (mrw)
1/18/01	COURT Order filed granting appellant's motion to file brief in support of COA in excess of the word count limitation, but not to exceed 28,000 [3106144-1] (HRD) Copies to all counsel. [00-10784] (mrw)
1/22/01	Motion filed by Appellant Thomas Joe Miller-El for certificate of appealability [3114865-1] Motion due ddl satisfied. [00-10784] (mrw)

DATE	PROCEEDINGS
1/22/01	Brief filed in support of motion for Certificate of Appealability (Incorporated in motion) [3114865-1] by Appellant Thomas Joe Miller-El Brief in Support ddl satisfied. [3114867-1] [00-10784] (mrw)
1/22/01	Record on appeal returned to 5CCA. Volumes: 1-3 & 5-13 Supplemental Volumes: 1 [00-10784] (mrw)
2/12/01	Extension granted by phone until: 3/23/01 to file response to COA for Appellee Gary L Johnson. [00-10784) (mrw)
2/21/01	Confirmation letter filed by Appellee Gary L Johnson confirming an extension of time to and including 3/23/01 for filing Response to COA. [00-10784] (mrw)
3/23/01	Response/opposition filed by Appellee Gary L Johnson to motion for Certificate of Appealability [3114865-1] by Appellant Thomas Joe Miller-El Response/Opposition ddl satisfied. [3172759-1] [00-10784] (mrw)
4/2/01	Motion filed by Appellant Thomas Joe Miller-El [3181575-1] for leave to file reply to response/opposition [3172759-1] by Appellee Gary L Johnson [00-10784] (mrw)
4/5/01	COURT Order filed granting appellant's motion for leave to file reply to respondent's response/opposition to COA by 4/13/01 [3181575-1] (HRD) Copies to all counsel. [00-10784] (mrw)
4/13/01	Reply filed by Appellant Thomas Joe Miller-El to response/opposition [3172759-1], motion for Certificate of Appealability [3114865-1] [3195886-1] [00-10784] (mrw)

DATE	PROCEEDINGS
5/21/01	Criminal Justice Act 20 received from James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El Timely: y/final payment request. [00-10784] (cgp)
5/21/01	Criminal Justice Act 20 received from Elizabeth Detweiler for Appellant Thomas Joe Miller-El Timely: y/interim request #1. [00-10784] (cgp)
8/7/01	Opinion order filed denying appellant's motion for Certificate of Appealability. (ISSUED AS AND FOR THE MANDATE) [3114865-1] Issd in T form? y Judge EHJ HRD RMP [00-10784] (jma)
8/7/01	Mandate issued. Approved BOC Issued (Y/N)?: n [00-10784] (jma)
8/9/01	Record on appeal returned to 5CCA. Volumes: 13 Supplemental Volumes: 1 Exhibits: 4 Boxes (Containing 11 folders SEALED: 2 Envelopes (Volume #4) & (1 Containing Exhibits) [00-10784] Case Management ddl satisfied. (mrw)
8/9/01	Record on appeal returned to USDC. Volumes: 13 Supplemental Volumes: 1 Exhibits: 4 Boxes (containing 11 folders SEALED: 1 Env. [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller-El for rehearing. # of copies filed: 4 Sufficient [Y/N]: N need copy of court's opinion [3350091-1] Sufficient Rehearing due on 8/31/01 for Thomas Joe Miller-El . [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller-El for rehearing en banc. # of copies filed: 20 Sufficient [Y/N]: N copy of court's original opinion [3350358-1] [00-10784] (mrw)
8/23/01	Rehearing made sufficient by Appellant Thomas Joe Miller-El [00-10784] Sufficient Rehearing ddl satisfied. (mrw)

DATE	PROCEEDINGS
9/12/01	COURT Order filed denying petition for rehearing [3350091-1], denying petition for rehearing en banc [3350358-1] With poll (Y/N)?: N Copies to all counsel. [00-10784] (mrw)
1/18/02	Supreme Court notice that petition for certiorari was filed on 12/11/01 by Appellant Thomas Joe Miller-El. Supct No.: 01-7662 [00-10784] (cav)
2/15/02	Supreme Court order received granting petition certiorari [3486654-1] by Appellant Thomas Joe Miller-El on 2/15/02. [00-10784] (mrw)
6/3/02	Criminal Justice Act 20 received from James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El Timely: y/supplemental payment request. [00-10784] (cgp)
6/3/02	Criminal Justice Act 20 received from Elizabeth Detweiler or Appellant Thomas Joe Miller-El Timely: y/final payment request. [00-10784] (cgp)
8/15/02	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Volumes: 1 [00-10784] (mrw)
3/3/03	Supreme Court opinion (dated 2/25/03) filed. [00-10784] Supreme Court Judgment due on 4/2/03. (mrw)
4/9/03	Supreme Court judgment filed. [00-10784] Supreme Court Judgment ddl satisfied. (mrw)
5/12/03	Non-dispositive opinion filed issuing a Certificate of Appealability on Petitioner's jury selection claim premised on Batson v. Kentucky, 476 U.S. 79 (1986). Published? Y Issd in T form? Y Type of non-disp.: PC [00-10784] (kgc)
5/12/03	Case reopened. [00-10784] (mrw)

DATE	PROCEEDINGS
5/12/03	COURT Order filed granting certificate of appealability. [4225458-1] (WED, EHJ, HRD) (HANDLED IN NON-DISPOSITIVE OPINION. Copies to all counsel. [00-10784] (dtg)
5/13/03	Briefing notice issued. [00-10784] A/Pet's Brief due on 6/2/03 for Thomas Joe Miller-El. E/Res's Brief due on 6/20/03 for Gary L Johnson. (mrw)
5/16/03	Attorney motion filed by James William Marcus for Appellant Thomas Joe Miller-El to substitute counsel Andrew Hammel for Elizabeth Detweiler [4193603-1] Date of COS: 5/15/03. [00-10784] (jbr)
5/21/03	COURT Order filed granting attorney motion to substitute counsel [4193603-1] (attorney Elizabeth Detweiler for Thomas Joe Miller-El terminated) Atty added: Andrew Hammel (HRD) Copies to all counsel. [00-10784] (mrw)
6/2/03	Appearance form filed by Andrew A Hammel for Appellant Thomas Joe Miller-El. [00-10784] (lmc)
6/2/03	Appellant's Brief filed by Appellant Thomas Joe Miller-El. Copies of Brief: 7 # of pages: 60 Word count: 13,878 Date of COS: 5/31/03 Hand Delivered [Y/N]: N Disk Provided [Y/N]: Y. [4208296-1] [00-10784] A/Pet's Brief ddl satisfied. (jbr)
6/2/03	Record excerpts filed by Appellant Thomas Joe Miller-El # of copies: 4 Sufficient [Y/N]: Y. [00-10784] (jbr)
6/20/03	Appellee's Brief filed by Appellee Janie Cockrell. Copies of Brief: 7 # of pages: 56 Word count: 13,996 Date of COS: 6/19/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4227291-1] [00-10784] E/Res's Brief ddl satisfied. Reply Brief due on 6/26/03 for Thomas Joe Miller-El. (mrw)

DATE	PROCEEDINGS
6/26/03	Reply brief filed by Appellant Thomas Joe Miller-El. Copies of Brief: 7 # of pages: 29 Word count: 6,901 Date COS: 6/25/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4234416-1] [00-10784] Reply Brief ddl satisfied. (mrw)
6/26/03	Record requested from district court. [00-10784] ROA due on 7/11/03. (mrw)
7/11/03	Record on appeal filed. Vol(s) of Pleadings: 13 Vol(s) of Transcripts: 1 Exhibits: 4 Boxes SCP SEALED: 2 Envs (1 Contains Volume #4) and (1 Contains Exhibits). [00-10784] ROA ddl satisfied. (mrw)
8/1/03	Case calendared for oral argument. [00-10784] (gam)
8/21/03	Appearance form filed by Gena Blount Bunn for Appellee Janie Cockrell. [00-10784] (mrw)
11/3/03	Oral argument heard. Case argued by Gena Blount Bunn for Appellee Doug Dretke, James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El [00-10784] (sme)
2/26/04	Opinion filed. Issd in T form? Y Mandate pull date is 3/18/04. [00-10784] (kgc)
2/26/04	Judgment entered and filed. [00-10784] (kgc)
3/4/04	Record on appeal returned to 5CCA. Volumes: 14 Exhibits: 4 Boxes SCP SEALED: 2 Sealed Envs [00-10784] (mrw)
3/19/04	Mandate issued. Approved BOC Issued (Y/N)?: n [00-10784] Mandate pull date satisfied. (tdb)
3/19/04	Record on appeal returned to USDC. Volumes: 14 Exhibits: 4 boxes SEALED: 2 envs (1-contains VOL # 5). [00-10784] (tdb)
4/6/04	Supreme Court notice that petition for certiorari was filed on 04/01/04 by Appellant Thomas Joe Miller-El. Supct No.: 03-9659 [00-10784] (dse)

DATE	PROCEEDINGS
6/28/04	Supreme Court order received granting petition certiorari [4796696-1] by Appellant Thomas Joe Miller-El on 06/28/04. [00-10784] (cav)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)
[FILED 07/16/96]

CIVIL DOCKET FOR CASE H: 96-CV-1992

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
07/16/1996	1	APPLICATION by plaintiff Thomas Joe Miller-El for Stay of Execution (15+). 0 (amy) (Entered:07/17/1996)
07/16/1996	1	MOTION by plaintiff Thomas Joe Miller-El for appointment of counsel (15+), (amy) (Entered: 07/17/1996)
07/16/1996	2	MOTION by plaintiff Thomas Joe Miller-El to proceed in forma pauperis (3), (amy) (Entered: 07/17/1996]
07/16/1996	3	Statement of Willingness to Accept Appointment by movant Mandy Welch, movant Gregory W Wiercioch, movant James Marcus (5). (amy) (Entered: 07/17/1996]

DATE	NO.	PROCEEDINGS
07/16/1996		PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (amy) (Entered: 01/17/1996)
07/17/1996	4	ORDER granting [1-1] application for stay of execution. The execution date of 7/30/96 is hereby stayed; Mandy Welch, director of the Texas Defender service is appointed for Mr. Miller-El; a Texas Defender Service Staff Attorney, designated by Ms. Welch will enter an appearance as attorney-in-charge within 10 days of the date of this order; appointed counsel is granted 120 days from the date of this order within which to file a petition for writ of habeas corpus on behalf of the plaintiff (signed by HBS) copies to counsel: 07/17/1996 FAXED Page(s) 2 (amy) (Entered: 07/17/1996)
07/17/1996	5	ORDER granting [2-1] motion to proceed in forma pauperis (signed by HBS) Copies to counsel: 7/17/96 FAXED Page(s) 1 (amy) (Entered: 07/17/1996)
07/23/1996	6	MOTION by Thomas Joe Miller-El for Jim Marcus to appear pro hac vice (4) (bjj) [Entered: 07/24/1996]
07/23/1996	7	ORDER granting [6-1] motion for Jim Marcus to appear pro hac vice (signed by Judge Sanders) Copies to counsel: 7/24/96 Page(s) 1 (bjj) [Entered: 07/24/1996]

DATE	NO.	PROCEEDINGS
07/23/1996	8	MOTION by defendant Director TDCJ for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (lch) [Entered: 07/24/1996]
07/23/1996	9	NOTICE of attorney appearance for plaintiff Thomas Joe Miller-El by Gregory William Wiercioch, Jim Marcus (2) (lch) [Entered: 07/24/1996]
07/24/1996	10	NOTICE of Intent to Respond by plaintiff Thomas Joe Miller-El (2) (tsp) [Entered: 07/25/1996]
07/24/1996	11	ORDER Response to motion reset to 8/6/96 for [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (signed by Judge Sanders) Copies to counsel: 7/25/96 Page(s) 1 (lmn) [Entered: 07/25/1996]
06/6/1996	12	RESPONSE by plaintiff Thomas Joe Miller-El to [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (wcc) [Entered: 08/07/1996]
08/12/1996	13	ORDER granting [8-1] motion for re-con-sideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition the petition will be due 10/21/96 (signed by HBS) Copies to counsel: 08/13/96 Page(s) 1 (wcc) [Entered date 08/13/1996]
09/20/1996	14	EX PARTE SEALED MOTION (svc) (Entered: 09/20/96)
09/26/1996	15	SEALED DOCUMENT placed in sealed area (wcc) [Entered: 09/27/1996]

DATE	NO.	PROCEEDINGS
10/09/1996	17	MOTION by plaintiff Thomas Joe Miller-El to extend time to file petition for writ of HC (6) (wcc) [Entered: 10/15/1996]
10/10/1996	16	ORDER ... granting petr's mot for ext of time to file petition for writ of HC Granted (signed by hbs) Copies to counsel: 10.10.96 Page(s) 1 (wcc): (Entered: 10/10/1996)
11/01/1996	18	SEALED EX PARTE DOCUMENT placed in sealed area (klm) (Entered 11/01/1996)
11/01/1996	19	MOTION by plaintiff Thomas Joe Miller-El to extend time to file Petition for Writ of Habeas Corpus (15+) (klm) (Entered: 11/01/1996)
11/01/1996	21	ORDER ... petition for writ of HC must be filed by noon 12/13/96 (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) (Entered: 11/06/1996)
11/05/1996	20	Request by plaintiff Thomas Joe Miller-El for Court to take judicial notice of Fifth Circuit Opinion (15+) (wcc) [Entered: 11/06/1996]
11/05/1996	22	ORDER Response to motion reset to 12:00 11/19/96 for [19-1] motion to extend time to file Petition for Writ of Habeas Corpus (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) (Entered 11/06/1996)
11/14/1996	23	RESPONSE by defendant Director TDCJ in opposition to [19-1] motion to extend time to file Petition for Writ of Habeas Corpus (10) (k1m) (Entered: 11/14/1996)

DATE	NO.	PROCEEDINGS
11/15/1996	24	MOTION by plaintiff Thomas Joe Miller-El for leave to file Reply to respondent Johnson's opposition to petitioner's motion for extension of time to file federal Habeas Petition 3) (wcc) (Entered: 11/15/1996)
11/20/1996	25	ORDER denying [19-1] motion to extend time to file Petition for Writ of Habeas Corpus (signed by HBS) copies to counsel: 11.20.96 Page(s) 1 (wcc) (Entered: 11/20/1996)
11/25/1996	26	SEALED DOCUMENT placed in sealed area (wcc) [Entered: 11/26/1996]
12/12/1996	27	SEALED DOCUMENT placed in sealed area (ldm) [Entered: 05/08/1997]
03/04/1997	28	MOTION by plaintiff Thomas Joe Miller-El for leave to file Petition for Writ of HC within statutory one year deadline (15+) (wcc) [Entered: 03/05/1997]
03/05/97	29	ORDER Response to motion reset to 12:00 3/14/97 for [28-1] motion for leave to file petition for Writ of HC within statutory one year deadline (signed by HBS) Copies to counsel: 03.05.97 Page(s) 1 (wcc) (Entered: 03/05/1997)
03/10/1997	30	ORDER ... vacating order of 11/1/96 pending a ruling on motion for extension of statutory one year deadline HC (signed by HBS) Copies to counsel: 03.10.97 Page(s) 1 (wcc) (Entered: 03/10/1997)

DATE	NO.	PROCEEDINGS
03/10/1997	31	RESPONSE by defendant Director TDCJ in opposition to [28-1] motion for leave to file Petition for Writ of HC within statutory one year deadline (5) (wcc) (Entered: 3/10/1997)
03/11/1997	32	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (10) (wcc) [Entered: 03/12/1997]
03/13/1997	33	ORDER granting [32-1] motion for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (signed by HBS) Copies to counsel: 03.14.97 Page(s) 1 (wcc) [Entered: 03/14/1997]
03/13/1997	34	RESPONSE by plaintiff Thomas Joe Miller-El in opposition to [31-1] opposition response (7) (wcc) [Entered: 03/14/1997]
03/14/1997	35	ORDER granting [28-1] motion for leave to file Petition for Writ of HC within statutory one year deadline; due 06.17.97 (signed by HBS) Copies to counsel: 03.14.97 Page(s) 1 (wcc) (Entered: 03/14/1997)
04/10/1997	36	SEALED DOCUMENT placed in sealed area (ldm) [Entered: 05/08/1997]
04/11/1997	37	MOTION by plaintiff Thomas Joe Miller-El for leave to file Petition for writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (8) (wcc) (Entered: 04/11/1997)

DATE	NO.	PROCEEDINGS
04/11/1991	38	ORDER Response to motion reset to 12:00 4/18/97 for [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 04.14.97 Page(s) 1 (wcc) (Entered 04/14/1997)
04/15/1997	39	SEALED DOCUMENT placed in sealed area (wcc) (Entered 04/18/1997)
04/18/1997	40	RESPONSE by defendant Director TDCJ in opposition to [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (11) (wcc) (Entered 04/21/1997)
04/21/1997	41	SEALED DOCUMENT placed in sealed area (wcc) (Entered: 04/21/1997)
04/22/1997	42	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97 (wcc) Modified on 05/15/1997 (Entered: 04/22/1997)
04/24/1997	43	MOTION by defendant Director TDCJ to strike petitioner's ex parte sealed motions for investigative funds (6) (wcc) (Entered: 04/24/1997)
04/28/1997	44	ORDER OF USCA (certified copy) Re: The petition for writ of mandamus is DENIED; (2) cc to judge. (st) [Entered: 04/29/1997]

DATE	NO.	PROCEEDINGS
09/30/1997	45	RESPONSE by plaintiff Thomas Joe Miller-El to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15+) (wcc) (Entered: 04/30/1997)
05/01/1997	46	REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (14) (wcc) (Entered: 05/01/1997)
05/06/1997	47	SEALED DOCUMENT placed in sealed area (wcc) [Entered: 05/07/1997]
05/07/1997	48	SEALED DOCUMENT placed in sealed area (wcc) (Entered: 05/07/1997)
05/16/1997	49	SUPPLEMENTAL REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15) (wcc) (Entered: 05/16/1997)
06/17/1997	50	MEMORANDUM OPINION AND ORDER re: compensation of counsel see order for details (signed by HBS) Copies to counsel: 06.17.99 Page(s): 4 (wcc) (Entered: 06/17/1997)
06/17/1997	51	PETITION for writ of habeas corpus; Date Received: 06.17.97 (5 volumes) (under separate cover) (wcc) (Entered: 06/17/1997)

DATE	NO.	PROCEEDINGS
06/17/1997	52	ORDER denying [42-1] motion for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97, denying [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 06.17.97 Page(s) 1 (wcc) (Entered: 06/17/1997)
06/17/1997	53	ORDER REFERRING CASE to Magistrate Judge Jeff Kaplan (signed by HBS) Copies to counsel: 06.17.97 Page(s): 1 (wcc) (Entered: 06/17/1997)
06/18/1997	54	ORDER denying [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (signed by HBS) Copies to counsel: 06.18.97 Page(s) 2 (wcc) (Entered: 06/18/1997)
06/20/1997	55	ORDER to show cause, set answer due for 9/15/97 for Director TDCJ (signed by JKaplan) Copies to counsel: CMRRR 6/20/97 Page(s) 1 (ldf) [Entered: 06/23/1997]
07/08/1997	56	CERTIFIED MAIL executed as to Director TDCJ 7/1/97 [55-3] order (1) (jas) (Entered: 07/08/1997)
07/21/1997	57	SEALED DOCUMENT placed in sealed area (jas) (Entered: 07/21/1997)

DATE	NO.	PROCEEDINGS
07/28/1997	58	ORDER that the Court's 6/16/97 memorandum Order is amended as follows: counsel shall submit vouchers once every two months, see order for specifics (signed by Magistrate Kaplan) Copies to counsel: 7/28/97 Page(s) 1 (jas) (Entered: 07/28/1997)
08/12/1997	59	Amended PETITION for writ of habeas corpus; Date Received: 8/12/97 (15+) (USC) (jas) [Entered 08/13/1997]
08/22/1997	60	MOTION with memorandum in support by defendant Director TDCJ to substitute Erik Everett Cary for Laura Bayouth Popps (3) (jas) (Entered: 08/22/1997)
08/22/1997	61	MOTION with memorandum in support by defendant Director TDCJ to extend time within which to file a responsive pleading (3) (jas) (Entered: 08/22/1997)
08/22/1997	62	ORDER granting [60-1] motion to substitute Erik Everett Cary for Laura Bayouth Popps (signed by Magistrate Kaplan) copies to counsel: 8/25/97 Page(s) 1 (jas) (Entered: 08/25/1997]
08/22/1997	63	ORDER granting [61-1] motion to extend time within which to file a responsive pleading reset answer due for 9/18/97 for Director TDCJ (signed by Magistrate Kaplan) Copies to counsel: 8/25/97 Page(s) 1 (jas) [Entered: 08/25/1997]
09/02/1997	64	SEALED DOCUMENT placed in sealed area (jas) (Entered: 09/02/1997)

DATE	NO.	PROCEEDINGS
09/19/1997	65	ANSWER to Complaint by defendant Director TDCJ and Motion for Summary Judgment and Supporting Brief (15+) (jas) (Entered: 09/19/1997)
09/19/1997	65	MOTION with memorandum in support by defendant Director TDCJ for summary judgment (15+) (jas) (Entered: 09/19/1997)
09/24/1997	66	NOTICE of Re-Designation of Attorney-In-Charge by plaintiff Thomas Joe Miller-El (2) (jas) (Entered: 09/24/1997)
09/24/1997	67	MOTION with memorandum in support by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 (5) (jas) (Entered: 09/24/1997)
09/25/1997	68	ORDER granting [67-1] motion for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 Response to motion reset to 11/7/97 for [65-1] motion for summary judgment (signed by Magistrate Kaplan) copies to counsel: 9/25/97 Page(s) 1 (jas) (Entered: 09/25/1997)
09/25/1997	69	Minute order: Ex Parte Hearing re: Attorney fees Held before Magistrate Judge Jeff Kaplan, taken under advisement; supplemental materials due by end of the week Court Reporter: electronic (2) (jas) (Entered: 09/26/1997)
10/17/1997	70	SEALED DOCUMENT placed in sealed area (jas) (Entered: 10/17/1997)
10/21/1997	71	SEALED DOCUMENT placed in sealed area (jas) (Entered: 10/22/1997)

DATE	NO.	PROCEEDINGS
11/06/1997	72	Unopposed MOTION by plaintiff Thomas Joe Miller-El to extend time/to reschedule due date for petitioner's reply to appellant's answer (3) (jas) [Entered 11/07/1997]
11/07/1997	73	ORDER granting [72-1] motion to extend time/to reschedule due date for petitioner's reply to appellant's answer; the reply is now due on 11/10/97. (signed by Magistrate Kaplan) Copies to counsel: 11/10/97 Page(s) 1 (jas) [Entered: 11/10/1997]
11/10/1997	74	CROSS MOTION for summary judgment by plaintiff Thomas Joe Miller-El (3) (jas) [Entered: 11/12/1997]
11/10/1997	75	Reply to respondent's answer and MEMORANDUM by plaintiff Thomas Joe Miller-El in support of [74-1] cross motion for summary judgment (15+) (USC) (jas) [Entered: 11/12/19971
11/18/1997	76	SEALED DOCUMENT placed in sealed area (jas) (Entered: 11/18/1997)
11/19/1997	77	**UNFILED PER ORDER UNFILING PLEADING 12/5/97** NOTICE of intent to supplement the record and to file motions for discovery and an evidentiary hearing by plaintiff Thomas Joe Miller-El (15+) (jas) Modified on 12/08/1997 (Entered: 11/20/1997)
11/24/9797	78	SEALED DOCUMENT placed in sealed area (jas) (Entered: 11/24/1997)

DATE	NO.	PROCEEDINGS
12/05/1997	79	ORDER unfiling [77-1] notice by plaintiff Thomas Joe Miller-El due to the following deficiency: FRCP make no provision for the filing of such a notice. Copies to counsel: 12/8/97 (signed by Judge Jeff Kaplan) Page (s) 2 (jas) (Entered: 12/08/1997)
12/08/1997	80	MOTION by plaintiff Thomas Joe Miller-El for discovery (17) (jas) (Entered: 12/08/1997)
12/08/1991	81	MOTION by plaintiff Thomas Joe Miller-El in the alternative to petitioner's cross-motion for sum jgm for an evidentiary Hearing (12) (jas) (Entered: 12/08/1997)
12/08/1997	82	Supplemental MEMORANDUM by plaintiff Thomas Joe Miller-El on Batson/Swain claim based on previously unavailable evidence (15+) (USC) (jas) (Entered: 12/08/1997)
12/08/1997	83	MOTION by plaintiff Thomas Joe Miller-El for leave to file supplemental briefing or in the alternative to amend (6) (jas) (Entered: 12/10/1997)
04/24/1998	84	SEALED DOCUMENT placed in sealed area (jas) (Entered: 04/27/1998)
04/27/1998	85	SEALED DOCUMENT placed in sealed area (jas) (Entered: 04/28/1998)
06/16/1998	86	SEALED DOCUMENT placed in sealed area (jas) (Entered: 06/17/19[illegible])
06/30/1998	87	SEALED DOCUMENT placed in sealed area (lch) (Entered: 07/02/1998)
03/03/1999	88	MOTION by plaintiff Thomas Joe Miller-El for execution date (1) (jas) (Entered: 03/08/1999)

DATE	NO.	PROCEEDINGS
03/08/1999	89	ORDER re: pla's mtn for execution date; petitioner shall file a response to this order by 3/19/99 and respondent shall file a response by 3/30/99 re: whether an execution date has been set and whether petitioner wants to dismiss his application for writ of habeas corpus or proceed with the case. See Order for specifics (signed by Magistrate Kaplan) Copies to counsel: 3/8/99 Page(s) 2 (jas) (Entered: 03/08/1999)
03/17/1999	90	AFFIDAVIT by plaintiff Thomas Joe Miller-El Re: [89-1] order (1) (jas) (Entered: 03/18/1999)
03/19/1999	91	Memorandum to the Court / RESPONSE by plaintiff Thomas Joe Miller-El to [89-1] order (5) (jas) (Entered: 03/22/99)
03/30/1999	92	RESPONSE by defendant Gary Johnson to [89-1] order (4) (jas) (Entered: 03/31/1999)
03/31/1999	93	ORDER petitioner has reaffirmed his desire to prosecute this death penalty habeas case ... the Court will disregard any statements to the contrary contained in petitioner's letter dated 2/27/99. (signed by Magistrate Kaplan) Copies to counsel: 3/31/1999 Page(s) 1 (jas) (Entered 03/31/1999)

DATE	NO.	PROCEEDINGS
07/28/1999	94	ORDER ... The parties are directed to answer these issues (specified in this order) in a written response; Petitioner shall file him response to this order by 08/16/99: Respondent shall file his response by 08/31/99; Responses shall not exceed 15 pages in length; No further pleadings will be allowed w/out leave of court see Order for specifics (signed by Magistrate Judge Kaplan) Copies to counsel: 07.28. 99 Page (s) 3 (lag) (Entered: 07/28/1999)
08/16/1999	95	Supplemental Court-Ordered Briefing/RESPONSE by plaintiff Thomas Joe Miller-El to [94-1] order (17) (jas) (Entered: 08/17/1999)
09/02/1999	96	Supplemental Court-Ordered Briefing on Procedural issues/RESPONSE by defendant Gary Johnson to [94-1] order (6) (jas) (Entered: 09/03/1999)
12/03/1999	97	SEALED DOCUMENT placed in sealed area (svc) (Entered: 12/06/99)
12/08/1999	98	SEALED DOCUMENT placed in sealed area (amy) (Entered: 12/08/1999)
12/10/1999	99	SEALED EX PARTE DOCUMENT placed in sealed area (svc) (Entered: 12/13/1999)
12/15/1999	100	SEALED DOCUMENT placed in sealed area (svc) (Entered: 12/16/1999)
12/15/1999	101	SEALED DOCUMENT placed in sealed area (svc) (Entered 12/16/1999)

DATE	NO.	PROCEEDINGS
01/31/2000	102	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS Petitioner's application for Habeas Corpus should be denied Signed by Judge Kaplan. Copies to cnsl: 1/31/00 Case no longer referred to Magistrate Judge Jeff Kaplan Objections to F and R due by 2/16/00 (15+) (nmc) Modified on 02/10/2000 (Entered: 01/31/2000)
01/31/2000		PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (nmc) (Entered: 01/31/2000)
01/31/2000	103	ORDER Instructions for service and notice of right to object (signed by Judge Kaplan) Copies to counsel: 1/31/00 Page(s) 2 (nmc) (Entered: 01/31/2000)
02/07/2000	104	CERTIFIED MAIL executed as to Gregory W Wiercioch 2/2/00 [102-1] findings & recommendations (nmc) (Entered: 02/08/2000)
02/07/2000	105	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00] (Entered: 02/08/2000)
02/07/2000	106	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00] (Entered: 02/08/2000)
02/07/2000	107	CERTIFIED MAIL executed 2/2/00 [102-1] findings & recommendations (nmc) (Entered: 02/08/2000)
02/07/2000	108	CERTIFIED MAIL executed as to Thomas Joe Miller-El 2/3/00 [102-1] findings & recommendations (nmc) (Entered: 02/08/2000)

DATE	NO.	PROCEEDINGS
02/10/2000	109	Unopposed MOTION by plaintiff Thomas Joe Miller-El to extend time to file objections to Magistrate Judge's findings and recommendations (3) (nmc) (Entered: 02/10/2000)
02/10/2000	110	ORDER granting [109-1] motion to extend time to file objections to Magistrate Judge's findings and recommendations Objections reset to 2/25/00 for [102-1] findings & recommendations (signed by Judge Sanders) Copies to counsel. 2.11.00 Page (s) 1 (mln) (Entered: 02/11/2000)
02/25/2000	111	MOTION by plaintiff Thomas Joe Miller-El for oral argument on petitioner's objections to the Magistrate judge's memorandum and recommendation (6) (nmc) (Entered: 02/28/2000)
02/25/2000	112	OBJECTION by plaintiff Thomas Joe Miller-El to [102-1] findings & recommendations (15+) (nmc) (Entered: 02/28/2000)
02/28/2000	113	Corrected OBJECTION by plaintiff Thomas Joe Miller-El to [102-1] findings & recommendations (15+) (nmc) (Entered: 02/29/2000)
03/07/2000	114	ORDER The court will hear oral argument on Findings and Recommendation and Petitioner's objections on 3/22/00 at 2:00 (signed by Judge Sanders) Copies to counsel: 3/8/00 Page(s) 1 (nmc) (Entered: 03/08/2000)
03/15/2000	115	Unopposed MOTION by defendant Gary Johnson to continue (3) (nmc) (Entered: 03/16/2000)

DATE	NO.	PROCEEDINGS
03/15/2000	116	Letter from Ann Kraatz notifying that she is now that attorney for Johnson (nmc) (Entered: 03/17/2000)
03/17/2000	117	ORDER granting [115-1] motion to continue The oral argument is reset for 4/28/00 at 2:00 (signed by Judge Sanders) Copies to counsel: 3/17/00 Page(s) 1 (nmc) (Entered: 03/17/2000)
04/28/2000	118	Minute order: Oral Argument re: Findings and Recommendation of US Magistrate Judge Kaplan Held before Senior Judge Barefoot Sanders Court Reporter: Janet Wright ... Oral Argument concluded. Order to be forthcoming (1) (vdf) (Entered: 05/01/2000)
05/08/2000	119	POST ARGUMENT BRIEF by plaintiff Thomas Joe Miller-El (8) (vdf) (Entered: 05/08/2000)
05/17/2000	120	APPLICATION/MOTION by plaintiff Thomas Joe Miller-El for Andrew Hammel to appear pro hac vice (3) (vdf) (Entered: 05/18/2000)
05/17/2000	120	ORDER granting [120-1] motion for Andrew Hammel to appear pro hac vice (signed by Judge Sanders) Copies to 05/18/00 Page(s) 3 (vdf) (Entered: 05/18/2000)
06/05/2000	121	MEMORANDUM OPINION AND ORDER ...The Court Adopts the Magistrate Judge's Findings and Recommendations. Miller-El's petition for writ of habeas corpus is hereby DENIED. (See order for specifics) (signed by Judge Sanders) Copies to counsel: 06/05/00 Page(s) : 6 (vdf) (Entered: 06/05/2000)

DATE	NO.	PROCEEDINGS
06/05/2000	122	JUDGMENT against plaintiff Thomas Joe Miller-El ...This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated 06/05/00. It is ordered that the Court that petitioner Thomas Joe Miller-El's Petition for Writ of Habeas Corpus be, and the same is hereby, DENIED and DISMISSED. (signed by Judge Sanders) Copies to counsel: 06/05/00 Page(s): 1 (vdf) (Entered: 06/05/2000)
06/05/2000		Case closed (vdf) (Entered 06/05/2000)
06/19/2000	123	MOTION by plaintiff Thomas Joe Miller-El to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (12) (vdf) (Entered: 06/19/2000)
06/21/2000	124	ORDER denying [123-1] motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (See order for specifies) (signed by Judge Sanders) Copies to counsel: 06/22/00 Page(s) 1 (vdf) (Entered: 06/22/2000)
07/20/2000	125	NOTICE of APPEAL by plaintiff Thomas Joe Miller-El re [124-1] order Payment: No fee paid TO Mailed (3) cc:Judge (jmr) (Entered: 07/20/2000)
07/20/2000		Notice of appeal and certified copy of docket to USCA: [125-1] appeal (jmr) (Entered: 07/20/2000)
07/27/2000		USCA Case Number 00-10784 for 125 Notice of Appeal filed by Thomas Joe Miller-El (jmr) (Entered: 03/28/2003)

DATE	NO.	PROCEEDINGS
08/02/2000	126	MOTION by plaintiff Thomas Joe Miller-El for certificate of appealability (8) (nmc) [Entered: 08/03/2000)
08/08/2000	127	Transcript order form from Attorney for Plaintiff: Transcript requested [125-1] appeal 4/28/00 Oral Argument, Court Reporter is Janet Wright (jmr) (Entered: 08/08/2000)
08/14/2000	128	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS of Magistrate Judge Jeff Kaplan Re: [126-1] motion for certificate of appealability should be denied; IFP should be granted;Motion no longer referred (2) cc: Judge (jmr) (Entered: 08/14/2000)
08/14/2000	128	ORDER ADOPTING [128-1] findings & recommendations (Signed by Judge Sanders) Copies to counsels: 8/14/00 Page(s): 2 (jmr) (Entered: 08/14/2000)
08/14/2000	128	ORDER denying [126-1] motion for certificate of appealability is denied proceed in forma pauperis is granted (signed by Judge Sanders) Copies to counsel: 8/14/00 Page(s) 2 (jmr) (Entered: 08/14/2000)
08/14/2000		Deadline updated; appeal record due set for 8/28/00 for [125-1] appeal (jmr) (Entered: 08/14/2000)
08/28/2000		Transmitted record on appeal 12 vol. record, 1 Sealed vol. and 13 SCR folders to U.S. court of Appeals: [125-1] appeal (jmr) Modified on 08/28/2000 (Entered: 08/23/2000)

DATE	NO.	PROCEEDINGS
10/11/2000	129	TRANSCRIPT filed Appeal record due on 10/26/00 [125-1] appeal for date of 4/28/00 Oral Argument (jmr) (Entered: 10/11/2000)
10/31/2000		Transmitted supplemental record of 4/28/00 transcript on appeal: [125-1] appeal (jmr) (Entered 10/31/2000)
08/09/2001	130	OPINION Of USCA ...COA is denied (certified copy) in accordance with USCA judgment re: [125-1] appeal (21) cc: Judge (jmr) (Entered: 08/09/2001)
08/13/2001		Record on appeal returned 12 vol. record, 1 transcript, 13 SCR folders and 2 sealed vols. from U.S. Court of Appeals: appeals (jmr) (Entered: 08/13/2001)
08/16/2002		Transmitted 12 vol. Record, 2 vol. Sealed record, 1 transcript and 13 vol. SCR papers on appeal to Supreme Court of the U.S. appeal (jmr) (Entered: 08/16/2002)
08/16/2002		U.S. Supreme Court Case Number 01-7662 for 125 Notice of Appeal filed by Thomas Joe Miller-El (jmr) (Entered: 03/28/2003)
03/28/2003		Appeal Record Returned from the U.S. Supreme Court: 12 vol. Record, 2 sealed vol., 1 transcript, and 13 vol. SCR papers. 125 Notice of Appeals (jmr) (Entered: 03/28/2003)
06/26/2003		Set Appeal Deadline re 125 Notice of Appeal: Appeal Record due by 07/10/2003 (jmr) (Entered: 06/26/2003)

DATE	NO.	PROCEEDINGS
07/08/2003		Certified and Transmitted Record on Appeal to U.S. Court of Appeals: 12 vol. Record, 2 vol. sealed record, 1 transcript and 15 vol. SCR papers; re 125 Notice of Appeal (jmr) (Entered: 07/08/2003)
03/23/2004		Appeal Record Returned: 12 vol. record, 1 transcript, 2 vol. sealed record, 15 vol. SCR papers; 125 Notice of Appeal (jmr) (Entered: 03/23/2004)
03/23/2004	131	Opinion of USCA: Affirmed; (certified copy) in accordance with USCA judgment re 125 Notice of Appeal filed by Thomas Joe Miller-El (jmr) (Entered: 03/23/2004)
03/23/2004	132	JUDGMENT/MANDATE of USCA: Judgment of the District Court is affirmed; as to 125 Notice of Appeal filed by Thomas Joe Millerl-El. Issued as Mandate: 3/19/04. (jmr) (Entered: 03/23/2004)

II. PLEADINGS

A. Direct Appeal—CCA #69,677, Dist Ct. #F85—78668

No.	Court	Document	Date
1	CCA	1st Motion for Extension of Time in Which to File Appellant's Brief	12/19/86
2	CCA	Order extending time to 2/2/87	12/23/86
3	CCA	2nd Motion for Extension of Time in Which to File Appellant's Brief	2/2/87
4	CCA	Order extending time to 3/15/87	2/3/87
5	CCA	Motion requesting extension	
6	CCA	Order extending time to 4/15/87	3/11/87
7	CCA	Motion for Extension of Time in Which to File Brief	4/15/87
8	CCA	Order extending time to 4/27/87	4/15/87
9	CCA	Brief for the Appellant	4/27/87
10	CCA	Motion to Extend Page Limitation of Brief	4/27/87
11	CCA	1st State's Motion to Extend the Time for Filing the State's Brief	5/19/87
12	CCA	Order extending time to 7/26/87	5/19/87
13	CCA	State's Motion to Extend the Time for Filing the State's Brief	7/27/87
14	CCA	Order extending time to 8/31/87	7/27/87

No.	Court	Document	Date
15	CCA	State's Motion to Extend the Time for Filing the State's Brief	8/31/87
16	CCA	Order extending time to 10/15/87	9/1/87
17	CCA	State's Motion to Extend the Time for Filing the State's Brief	10/15/87
18	CCA	Order extending time to 10/25/87	10/15/87
19	CCA	Cover Letter for State's Brief (Not attached	10/23/87
20	CCA	Letter noting receipt of Court's order extending time to 1/27/88 and Order extending time	11/4/87
21	CCA	Letter, defense attorney, requesting oral argument	11/25/87
22	CCA	opinion, abating appeal	3/3/88
23	CCA	State's Motion for Rehearing (Seeking Modification of the Court's Order of Remand's Delivered March 3, 1988)	3/17/88
24	CCA	State's Motion for Leave to File MRH denied; abated to TC	4/27/88
25	CCA No-tice	Supplemental Statement of Facts was received and filed	7/5/89
26	CCA	opinion, Affirmed	9/16/92
27	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	10/8/92

No.	Court	Document	Date
28	CCA	Order extending time to 10/30/92	10/8/92
29	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	11/03/92
30	CCA	Order extending time to 11/30/92	11/3/92
31	CCA	Motion for Leave to File and Motion for Rehearing	11/30/92
32	CCA	Order extending time to 12/8/92	12/8/92
33	CCA	Mandate	2/5/93
34	CCA	Shuck Cover	
35	Crim Dist. Ct. No. 5, Dallas Cty	Modifying Execution Date	2/7/94
36	Crim Dist. Ct. No. 5, Dallas Cty	Order Modifying Execution Date and Appointing counsel	7/18/94
37	CCA	Order Modifying Execution Date	9/20/94
38	Crim Dist. Ct. No. 5, Dallas Cty	Order Setting Execution Date	10/5/2001

JURY SELECTION IN A CRIMINAL CASE

It is often said that most cases are won or lost on Voir Dire—agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance of first impressions; if you can show—the panel that you wear the "white hat," and if you don't destroy that illusion during the trial, then the jury will *want* to convict. Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines—if you know what to look for.

First and foremost, you are dealing with people, and there are no hard and fast rules governing who will be a good State's juror. Who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the Defendant, the rules of the Court, the personality of the defense attorney, and your own individual style and judgement.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to be said to the panel, and some things to look for in a juror.

I. Purpose of Voir Dire.
   - A. Legal purpose.
     1. To qualify jurors on law regarding case.
     2. To become acquainted with veniremen so that you may use your strikes intelligently.
   - B. Tactical Purpose.
     1. Allow the veniremen to be impressed with you and your cause.
     2. Explain the law in the manner most beneficial to the State.

II. Preparation for Voir Dire. In many counties, the prosecutor selecting the jury will not present the evidence.

A. Look up and learn the law regarding the particular offense to be tried.
   1. List and remember the elements of the offense.
   2. Understand and remember any definitions of words of art applicable to the offense.

B. Be well acquainted with facts of your case.
   1. Learn what general law—will be applicable to the facts.
   2. Learn all weaknesses in the case in order to prepare the jury.

C. If you do not know the judge well, discuss Voir Dire with him in advance.
   1. It will allow you to know where you stand on questionable issues so that you will not be embarrassed in front of the panel by an adverse ruling.
   2. If the judge usually conducts Voir Dire himself, he may allow the lawyers to do it if adverse asked—this is always preferable.

III. What to look for in a juror.

A. Attitudes.
   1. You are looking for a strong, stable, individual who believes that Defendants are different from them in kind, rather than degree.
   2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.
   3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.
   1. Look at the panel out in the hall before they are seated. You can often spot the show-offs and the liberals by how and to whom they are talking.

   2. Observe the veniremen as they walk into the courtroom.
      a. You can tell almost as much about a man by how he walks, as how he talks.
      b. Look for physical afflictions. These people usually sympathize with the accused.
   3. Dress.
      a. Conservatively, well dressed people are generally stable and good for the State.
      b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non—conformist and therefore a bad State's juror.
   4. Women.
      a. I don't like women jurors because I can't trust them.
      b. They do, however, make the best jurors in cases involving crimes against children.
      c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.
      d. Young women too often sympathize with the Defendant; old women wearing too much make—up are usually unstable, and therefore are bad State's jurors.
      e. It is impossible to keep women off your jury, but try to keep the ratio at least seven to five in favor of men.
   5. Weight. Extremely overweight people, especially women and young men, indicates a lack of self—discipline and often times in stability. I like the lean and hungry look.
   6. Age. People over forty are more settled and more ready to believe that criminals should be punished.

7. Race. Minority races almost always empathize with the Defendant.
8. Demeanor.
   a. Attentive, intelligent looking veniremen that you are able to communicate with on Voir Dire will generally be all right.
   b. Always observe how the veniremen react when being questioned by the defense attorney, and compare it to the venireman's reaction to you.

IV. Your approach to the jury panel.
   A. When the judge is talking to the panel.
      1. Sit at the counsel table with your chair turned at an angle so that you can see the judge and the panel; ie, never turn your back to the panel.
      2. Sit upright and have some eye contact with the panel.
   B. When you are talking to the jury panel.
      1. Stand upright and be as loose and at ease as possible.
      2. Stand close to the panel. The further you are away, the more distant seems the communication.
      3. Don't pace, but some movement may aid in keeping their attention.
      4. Use your notes as little as possible.
      5. Smile, be pleasant, but not too jovial; impress them with your earnestness.

V. Speaking to the entire panel.
   A. Introductory.
      1. Introduce yourself, tell your position, who you work for and who you represent.
      2. Introduce the Defendant and his attorney(s), asking if anyone knows them either personally

or by reputation. Don't dignify the Defendant by calling him "Mister", or using his first name.

3. Orient the panel (if the judge does not) as to what Court they are in, the jurisdiction of the Court (as to felony vs. misdmeanor), explain the difference and explain that your purpose is to find twelve fair and impartial people to serve on this jury—people that can be just as fair to the State as you *know* they will be to the Defendant.
   a. This approach makes it appear that the State is the underdog—most people will pull for the underdog.
   b. Reasons for briefly orienting the panel.
      (1) Most veniremen are ignorant of any specifics regarding the Courts and the legal procedures.
      (2) It gives the panel the feeling that you are trying to aid them.
4. Explain their duties as jurors.
   a. They are not expected to know the law and, the judge will give them all the law of the case in the Court's charge.
   b. The jury is to determine the facts of the case, the credibility of the witnesses, and the weight to be given their testimony.
      (1) The jury may believe all, any part of, or nothing that any witness says.
      (2) They may look to the witness demeanor motive or bias, reasonableness of what is said—using their common sense to guide them.
   c. If you know that the Defendant has more witnesses than you, explain that numbers are not decisive, and they

may disbelieve one hundred witnesses in favor of the testimony of one.

B. Qualifying the panel on the general law. This is the law applicable to every criminal case.

1. Presumption of innocense.

Tell the jury

a. All Defendants in a criminal case, no matter what they are charged with, are presumed to be innocent.

b. It is a legal presumption and just because they are presumed to be innocent does not mean that he (the Defendant) did not commit the crime.

c. This presumption lasts only until the State removes it by proving its case to their satisfaction beyond a reasonable doubt.

2. Burden of proof—beyond a reasonable doubt.

Explain that:

a. The State understands that burden and willingly accepts it, or else would not be here.

b. Though we accept our burden, we wish to be held to no higher burden, such as; beyond any doubt, or beyond a shadow of a doubt.

c. A mere discrepancy in evidence is not reasonable doubt.

d. The doubt must be reasonable, and it must be a reasonable doubt applicable to one of the elements of the offense that the law requires the State to prove to entitle it to a conviction.

3. Defendant's failure to testify.

Explain that:

a. The Defendant may call witnesses in his own behalf if he chooses, and may subpoena any witness that could help him.

b. The Defendant may testify in his own behalf if he chooses, but if he should decide not to testify, we who represent the people can not call him as a witness, and they, the jury, could not consider his failure to testify as any evidence.

c. If he should so choose to testify, they must consider his credibility; looking to his demeanor, the reasonableness of his testimony, and his motives for lying—what *he* has to gain or lose.

d. Just because he is presumed to be innocent, does not mean that he is presumed to be a truth teller.

C. Qualifying the panel of the law of your case.

1. Carefully explain the elements of the offense as listed in the indictment and advise the panel that the State must prove these things, but none other.

2. Define any words of art that are necessary to your case and distinguish the legal meaning from the usual meaning, such as:

a. "Intoxication" is not necessarily drunk.

b. "Malice" is not premeditation.

c. "Possession" is not ownership.

d. "On or about" means accessable.

e. "Assault" does not require a touching.

f. "Carnal knowledge" requires only penetration.

3. Give examples when you explain the law. The examples should be of a crime less aggravated than the one you intend to

prove, so when you present your facts the jury will think it is a highly aggravated crime.

4. Qualify the panel on defensive issues.
   a. The defense attorney will do this anyway, so you tell them first and in the light most beneficial to the State.
   b. Circumstantial evidence.
      (1) Explain that it is a type of evidence , and is different only in kind to direct evidence. Tell them that fingerprints are circumstantial evidence.
      (2) Give examples of circumstantial evidence.
5. Punishment.
   a. This is the most important qualifying issue.
      (1) In many cases the only issue is that of punishment. A case is never won unless a jury returns more time than you offer on a plea of guilty.
      (2) A person weak on the maximum punishment will generally be weak on guilt.
   b. Tell the jury that the State intends to ask the jury a sentence for "life" (or a substantial number of years, etc.) at the close of the testimony.
      (1) This can backfire unless you have evaluated the case and know that you can ask "life" (etc.) without looking ridiculous.

      (2) This is a good approach because it gives the jury time to get used to the idea of a high verdict.
      (3) It allows you to argue on punishment that you have been fair with them (the jury) from the outset by telling them what you would be seeking.
   c. Always stress the maximum in the range of punishment, but advise and qualify the panel on the minimum—otherwise, you may lose your aura of extreme fairness.
   d. Probation.
      (1) Ask the judge to require the application for probation to be filed before jury selection so you may qualify the jury.
      (2) Explain the probation law to the panel, and that just because a person may be eligible for probation, does not mean that he is entitled to probation.
      (3) On heavy cases such as murder, rape and robbery, etc:
         (aa) Explain that every Defendant, no matter what he is charged with falls within the probation law.
         (bb) The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. Since you talk to the panel first, you can prevent the disqualification of a strong juror.

(11) Explain that they don't have to be able to *think* of a murder case where the Defendant may deserve probation, but if one *should* come along, and they thought it was the right thing to do, they could—vote it.

(22) Couch the question in terms of what a "fair" person would do (no one considers themselves unfair.)

(4) Always tell the jury that the State is opposed to probation in this case.

e. Tell the panel about a bifurcated trial and that on punishment they may consider all of the evidence introduced on the guilt or innocence phase of the trial, and also the reputation, character and prior criminal record, if any, evidence of which may be admitted on the punishment hearing.

(1) The above is a true statement of the law, and any judge should allow a prosecutor to so advise the jury.

(2) Stress the words, "and prior criminal record", because it will dispell the jury's beliefs that a Defendant's record will be admitted on the guilt or innocence hearing.

f. Talk in terms of a "sentence" of life, etc. stressing the word "sentence". This will convey to the panel the fact that he will be paroled early.

g. The State has no burden of proof on punishment as it does on guilt. We need not prove beyond a reasonable doubt that the Defendant deserves any Particular sentence—it is the jury's job to make the punishment fit the crime.

VI. Questioning the veniremen individually—this is done after addressing the panel as a whole.

A. Demeanor, preliminaries and helpful hints.

1. The questioning will progress much more smoothly if you can persuade the Court to seat the veniremen in the order that they are listed.

2. Be pleasant and respectful. Use "Yes, sir" or "Yes, Ma'am", and never talk down to a venireman.

3. Remember that the veniremen are probably self concious; the more at ease you are with them the more they will be at ease and honest with you.

4. Never give any indication to the panel as to whom you will strike.

5. Look at the venireman's eyes and throat during your questioning (especially relating to punishment).

6. Rate your venireman from one to five in the order of his desirability.

a. This will allow you to concentrate on the individual and his answers rather than writing.

b. If you want a record of their answers, have someone else in Court take notes.

7. In striking your lists be careful; more than one prosecutor has left an undesirable venireman on the jury as a result of striking the wrong name.

B. Questioning the venireman individually.

1. Ask the length of residence in the county.
   a. People that move around very much are often unstable.
   b. If the venireman have not lived in the county long, ask where they were born and reared.
      (1) People from small towns and rural areas generally make good State's jurors.
      (2) People from the east or west coasts often make bad jurors.
2. Who their family consists of.
   a. People with a family are generally more responsible and therefore better jurors.
   b. If the venireman has children, ask their ages if the case is one involving a crime against children, or the Defendant is young.
3. Occupation.
   a. Ask a man "what is your profession or occupation?". Ask a woman "Are you employed outside the home?"
   b. Working men.
      (1) If a man is unemployed it may indicate instability.
      (2) Men who are self—made successes, or work with their hands, or work in a managerial capacity are usually good.
      (3) Technical jobs (engineers, accountants and scientists). There are two theories:
         (a) They will pick your case apart, therefore, they are bad.

         (b) They are not inclined to "chase rabbits" thrown out by defense attorneys, therefore they are good.
      (4) Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State's jurors.
   c. Working women.
      (1) These women are often preferable to other women because they have had a glimpse of the cruel, hard world.
      (2) Women working in retail sales often make good State's juror's.
   d. Spouse's occupation is a good question because all people to a varying extent, are reflections of their spouse.
4. Ask if the venireman has any hobbies or interests that occupy their spare time.
   a. Active outdoors type hobbies indicate the best State's jurors.
   b. Hunters always make good State's jurors.
5. Ask men if they have ever served in the military; if so, when, what branch of the service, their rank upon discharge and if they saw combat. Marines, master sargeants and those that have seen combat generally make good State's jurors.
6. Ask veniremen their religious preference.
   a. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.
   b. Lutherans and Church of Christ veniremen usually make good State's jurors.

c. Those that indicate that they have no religious preference are often non-conformists and bad State's jurors.

7. Ask veniremen if they have ever had a direct interest in the outcome of a criminal case.
   a. This is an interest in the sense that they, or a member of their family, or close personal friend has been charged with a crime.
   b. If someone volunteers, take him before the bench to illict further questions, rather than embarrass the venireman in front of the entire panel.
   c. Obviously, you don't want anyone who had a close friend or relative that was prosecuted by the State.
8. Ask the veniremen if they have previously served on a criminal jury.
   a. Experienced jurors usually are better for the State than the inexperienced jurors.
   b. You may ask the veniremen anything about the prior case other than the verdict.

VOIR DIRE TRANSCRIPT EXCERPTS RE JURY SHUFFLE

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[6] jury panel shuffled?

MR. KINNE: No, Your Honor.

THE COURT: Does the defense wish a shuffle?

MR. CUNNINGHAM: Give us one minute, Judge.

MR. NELSON: We're going to change our election. We changed our decision.

THE COURT: I'm going to recess the jury panel to accomplish the shuffle for the State and let the lawyers attend to that.

MR. WEST: The State had already indicated they were not going to shuffle. I object.

THE COURT: I'll overrule. You still have your election. I'll overrule your objection and I'll recess the jury panel for you to accomplish the first shuffle and bring them back at 12:30. If the defense wants a shuffle, we'll do that and I'll go ahead with the **[7]** next shuffle.

(Whereupon, the following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Ladies and gentlemen of the jury panel, a procedural matter came up that I needed to attend to. Many of you must be wondering about lunch, if you're going to get to eat. I'm going to recess you—all until 12:45. That is only an hour and five minutes. It will be crowded downstairs and there will probably be a line.

Since I have not started any part of voir dire, let me give you these instructions: Since you have been called up as a prospective jury panel in the case entitled the State of Texas versus Thomas Joe Miller-El—he is—the man in the blue that looks like a leisure suit-you-all should not **[8]** and may not discuss his case or anything you might know or think you may hear about it. There should not be any conversation about it. If someone talks about the case in your presence, anyone says anything in your presence about

Thomas Joe Miller-El, tell them you're on a jury panel and the Judge has instructed you not to talk about it. I don't think anyone will, but if they do, let me know.

When you come back at 12:45, we may change the order that you're seated in, so stay out in the hall and we'll call you in. Thank you, folks.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held out of the presence and hearing of the jury panel.)

MR. WEST: Your Honor, we **[9]** will shuffle.

THE COURT: What I'm going to do is—this shuffle is granted—I'm going to go ahead and do general voir dire and ask the jurors to take the questionnaires and complete them so we can accomplish that much since this is the last shuffle that we'll have.

(Whereupon, the following' proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Good afternoon, ladies and gentlemen.

Welcome back. Let me start out with what I have to say by giving you some general information, I did not give you much information this morning before I recessed you because, at that time, I wasn't prepared to go forward with any more of this part of the voir dire.

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[15] been returned to us, we then—I will assign some sort of order or schedule of jurors that we'll talk to one by one. I hope to do at least one this afternoon. Probably the first juror over here will be number one. I don't know who will be number one at that time, but be that as it may, somebody will be the first juror to start out with. If we can keep a schedule, and I think we can after the bumpiness of today, were going to talk to as many as six a day. As slow as that may sound, that is not slow. If we can do six a day, we will have accomplished a lot.

So very candidly, anyone who, when we start our selection process, is beyond the first two rows is probably not go-

ing to be reached at all to be talked to. We will talk to you one at a time. The purpose of that is very **[16]** simple. It allows the lawyers and the Court and you to have very important direct one-on-one contact which, in this kind of case, we find very vital and very necessary.

I know that many of you—all are wondering to yourself, well, they told me downstairs this morning that it would be one day or one jury. Well, let me tell you a little bit about our schedule. We hope—we being all the lawyers and I—that this jury selection process will be completed within a month. We expect it will take at least four weeks including this week. You will discharge the initial part of your jury duty by coming for your individual questions probably one day this week. If you're not reached this week on the list, then you're discharged from any further service in this case. We **[17]** will start out with a new panel next Monday to get fifty more people up here and start out with the same process. We'll do that every Monday until we select a jury.

If you're not on the jury and you're not reached at all or, if you are reached and you're on the jury or excused, then you're through, your service has been discharged. If you are selected as one of the jurors—and obviously this group would provide one of our early members or several early members, hopefully—then you would be sworn in and given a date which we expect to start the trial. You would be called back when all twelve jurors are selected and the alternates that we decide to select and the case will be started.

The case, the lawyers tell me, itself will probably take

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[658] third one depending on what the evidence shows. What Mr. Macaluso was asking and I think what Mr. Cunningham asked, the same question, if it was, if the evidence shows beyond a reasonable doubt that the answer to number one should be yes and number two should be yes, that you would have to answer yes., What you said is, you would not want to be put in that position by having taken the oath initially because you could not answer yes to those based on your understanding that would result in the Defendant be-

ing assessed by the Court, not by you but by the Court, the death penalty? That's sort of a convoluted question, but is that—

MR. NELSON: That is, in effect, what I said, yes, sir.

THE COURT: All right. Now, I think something else that you

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[773] The time that he committed the offense cannot be convicted of the offense of murder because he was insane. Do you agree with that, sir?

A. Did I understand you to say, if someone were proven insane at the time?

Q. Yes, sir. In other words, if the insanity defense is raised by the accused and that fact is established by a preponderance of the evidence, then the law says that person is excused because of the fact that he was insane.

A Yes.

Q. Therefore, he's not guity of the intentional and knowing taking of another person's life because he did not have his mental capacity to do it. He didn't know what he was doing. Do you agree with that, sir?

A. Yes.

Q. Also, the law says, when you get into involuntary manslaughter, a person is not guiltyof murder. So we are taking all these and leaving nothing but where a person intentionally kills another person. He knows that he's killing him and there is no justification, no excuse whatsoever. In that instance—

[774] Mr. MACALUSO: Excuse me, Your Honor, I don't mean to—pardon, me MR Cunningham. I believe the statement was made that there is no excuse whatsoever. No legal excuse I think would be the proper phrase. There may be all sorts of considerations or excuses, but no legal excuse.

THE COURT: Your point is made. Do you understand that, Mr. Wagoner, that the law does justify and excuse certain kinds of killings. Mr. Cunningham has mentioned several situations, if you're insane, self—defense, an accident. For example, even though he may have intentionally or knowingly caused the death of somebody, which would be murder ordinarily, if you did it while you were insane or self—defense, then the law justifies or excuses you in those situations. I think **[775]** that's what Mr. Cunningham is talking about. There my be a lot of other reasons, so there's a difference. Do you understand?

Mr. WAGONER: I understood that what the gentleman has just asked me, in my mind is it a legal reason, is it a law, that says that this—things that might be asked by a lawyer, if its' a law, is there an excuse written in the law that would protect—I use the word protect—the individual or be excusable for this individual for that particular thing. Did I answer to your question to your satisfaction?

Q. Yes, sir. You've indicated that you served on a kidnapping case. Did the jury reach a verdict in that kidnapping case?

A. Yes, we did.

Q. In the robbery case, did the jury reach a verdict?

A. They were connected together.

Q. In other words, you heard evidence **[776]** on the kidnapping one day and then evidence on the robbery case the next day?

A. It was three days or four altogether and they were combined.

Q. You went out and decided whether or not he was guilty of kidnapping and after resolving that issue, you went out and decided whether or not he committed the robbery?

A. Yes.

Q. And you—all were able to reach a verdict?

A. We did.

Q. Did any of the district attorneys talk with you after the case was over with?

A. No. I say no. I asked one of them a question on my own after it was all completely over with.

Q. Was that about what sentence he would receive?

A. No.

Q. About something that happened during the trial?

A. No. I just wondered who paid both lawyers. I asked him that question. I don't know why I did, but I did ask the question. It

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[842] on our list. That last juror then would be Ms. Hernandez.

Now, let me give two sets of instructions, ladies and gentlemen. First of all, good or bad news, I'm not sure how it's going to be taken. From Ms. Freeman on to the end of that row, which would be Ms. Freeman, Ms. Bradford, Mr. Gossett, Mr. Smith and Mr. Melton, and all of the back row will be excused from jury service in this courtroom at this time and the central jury room asked me to return you to them so they could see if they're going to need you for something else. I don't know whether they do or not, but you—all will not be voir dired in this case. There's no sense in tying your time up at this time with what I'm getting ready to finish with the panel I'm retaining

I appreciate your patience

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[1529] A. Yes.

Q. All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody, and you murder somebody who is a policeman or a fireman or a jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A. Yes.

Q. Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when the were six or seven people killed in a bar about two years ago?

A. Yes.

Q. That could be a capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tired for capital murder for hiring him and he could be tried for doing **[1530]** the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in this indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if your murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A. Yes, sir.

Q. We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this? Do you feel those are the types of cases, generally speaking, where you feel the death genalty would be appropriate, depending on the facts and circumstances?

A. Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q. Okay. But depending upon those things that you mentioned earlier, do you feel, things that you mentioned earlier, do you feel, for example, a murder during a robbery where a person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A. I think if you had a choice, you know.

Q. Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing the to do or it wasn't—we didn't need it or we shouldn't have it?

A. Well, there again, it goes back to the situation, you know, sometimes.

Q. You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A. No, I've never—you know just as far as generally speaking, I've never.

Q. You feel it's proper on a case-by-case basis; is that right?

A. That's the way I look at it, depending on the individual case.

Q. Let me ask you: Do you see it **[1532]** serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A. Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q. What do you think it accomplishes when you feel it does?

A. I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some case you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, **[1533]** but sometimes, you know, you feel maybe

this is not really punishing the person to give him the death penalty.

Q. It's over?

A. Yes, it's over and you know, they're not really suffering from it.

Q. Let me ask you this: You're a married man, aren't you?

A. Yes sir.

Q. Do you know or would you hazarded a guess how your wife feels about the death penalty?

A. No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have a feeling. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A Well, if I had to guess, I would say probably it would depend on the situation.

Q You've got three children, is that right, sir?

A Yes, I have.

Q On of them is grown, though. **[1534]** Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not guilty. Could you do that as well?

A. Yes.

Q Just call it the way you see it. That's all that would be expected. How, in the second part of the trial under the old law, the jury might hear more evidence and they might **[1535]** not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence or some number of years. If you someone ought to die for what you heard and the others agreed to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, if you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. Now, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trail—after you've heard all of the evidence, the Judge will give you two or three question to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they prove they should be answered yes, you answer **[1536]** them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with that at all?

A. No.

Q If we don't then you, as a juror, are required to answer the question no. could you do that, as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the

Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it could you do that?

A Yes, I could.

Q All right. The same thing, one or more no answers equals a life sentence. Whether the Judge agrees with you or disagrees **[1537]** with you, you'll never know anyway because he's not going to say that, what his feelings are. With all due respect t the Court, he's not in a position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all

A No.

Q The first one, I think, is pretty much self—explanatory. It asks you whether the Defendant acted deliberately with the reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you he acted deliberately, if you can hear facts that convince you that be acted with the reasonable expectation that someone would die, **[1538]** you answer the question yes. If you don't you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think is being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that-words means to you in that context?

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape robbery, burglary or an assault. It says criminal acts of violence. That may be self—defining. It may mean what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A I suppose there's always that

* * * *

[1777] back this afternoon. Folks, thank you again for your patience. See you this week.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held.)

THE COURT: Well, on the record now that everybody is back including the Defendant, of course. Mr. Nelson, does the State have a question?

MR NELSON: Judge, our position is basically this: at the time of the second shuffle this morning when Mr. West and I went to the central jury room and shuffled, Mr. West had put the cards in the basket and started to pick them out and I said at that point, "Why don't you shuffle them a little bit more. I think we need to shuffle a little bit more." Or something like that. My **[1778]** recall is that Mr. West's comment at that time was, "Well, just take it up with the Court." That's what I'm attempting to do at this time.

My understanding that a reason for the shuffle is to completely rearrange or randomly select again the array in

the seating of the jury. We have—I don't know the exact figures.

Some people checked on it before me, but we have a large number of persons who didn't change position at all from the second list to the third list. We have sixteen in a row at one point and at another point ten in a row with only one person in between those groups.

Basically what we're saying is, Judge, that we have sixteen in a row and ten in a row with one in between and then six in a row. Although those things can happen, the State's position is, under the **[1779]** Latham case, shuffles are to be done in the courtroom unless it is otherwise agreed by the parties. We had that agreement up to the point where I objected to Mr. West's procedure down in central jury room and therefore, we would ask the court to hold that this shuffle was not correctly done and to either reshuffle the panel, the Court itself, or the clerk as directed by the case law and statute in this case or to quash this panel and we will begin with a new panel at the earliest possible time.

MR. CUNNINGHAM: Jim, could I ask you just one question?

MR. NELSON: Sure.

MR CUNNINGHAM: That was a first shuffle; is that correct?

MR. NELSON: That's correct.

MR. CUNNINGHAM: And you went down and shuffled on behalf of the State?

[1780] MR. NELSON: With Mr. West there.

MR. CUNNINGHAM: With Royce standing there?

MR NELSON: Right.

MR. CUNNINGHAM: And he didn't say anything about the way you did whatever you did?

MR. NELSON: No he did not.

MR. CUNNINGHAM: And then you cam back up here.

The Jury panel was seated?

MR NELSON: No. The second time they were not seated.

MR. CUNNINGHAM: I'm talking about the first time, We came back up and we looked at the list and then we said we wanted to a shuffle right?

MR. NELSON: Before they were seated again.

MR. CUNNINGHAM: Then you went back down and there was a second shuffle?

MR. NELSON: That's when the **[1781]** events took place.

MR. CUNNINGHAM: Okay. But the State had received its shuffle?

MR. NELSON: Correct.

MR CUNNINGHAM: Okay. You then had some conversation with Royce and said you were going to take it up with the Court?

MR. NELSON: Well, I suggested that they may need to be shuffled some more and Mr. West say to take it up with the Court.

MR. CUNNINGHAM: Then we came up and went into the Judge's chambers, all four of us were in the Judge's chambers—

MR. WEST: We will waive the oath.

MR. NELSON: [text _____]

MR. CUNNINGHAM: We will waive it, but everything you said, you're saying as an officer of the court?

[1782] MR. NELSON: Yes, that's correct. If Mr. West disagrees with anything I've said as far as the conversation or anything, then—

MR. CUNNINGHAM: Then all four lawyers, with the Judge, went back into his chambers and you—all were talking about this matter?

MR. NELSON: Correct.

MR. CUNNINGHAM: At that time you did not say, "Judge we object to the manner in which Mr. Royce West shuffled the jury"?

MR. NELSON: That's correct. What was said at that time was, I had some people checking on some things and I wasn't finished checking.

MR. CUNNINGHAM: You did not tell the Judge, "We object and we don't want to go any further right now"; is that true?

MR. NELSON: No, I didn't use those exact words.

[1783] MR. CUNNINGHAM: Then we came back out and the panel was seated again. The questionnaires were taken up and then the Judge started giving his instructions?

MR. NELSON: Correct.

MR. CUNNINGHAM: He excused sixteen jurors and you did not object to his excusing sixteen, is that correct?

MR. NELSON: The sixteen were excused.

MR. CUNNINGHAM: From the back row only?

MR. NELSON: Yes.

MR. CUNNINGHAM: Then after the Judge's instructions, he told everybody what time he wanted them back all of that and up to the point, you had not told the judge, " we object to this panel and we either want it reshuffled or we want the panel quashed"?

MR. NELSON: No, I had not said those words, but I had told **[1784]** the Judge that we had—that it might be a problem and that I was investigating it further. I believe the Court will recall that I informed the Court of that before the Court did his general voir dire.

MR. CUNNINGHAM: The week of February 3, the jury panel was seated. The State requested a shuffle. You and Mr. West went downstairs. You shuffled; is that correct?

MR. NELSON: This procedure has been followed.

MR. CUNNINGHAM: The weeks of February 3 and the week of February 11th, the same procedure that we did today?

MR. NELSON: Yes; but without objection from either side.

MR. CUNNINGHAM: In other words, you were familiar with thirty—five, forty, eleven; that **[1785]** they were supposed to be shuffled down and you did not object the week of February 3 or the week of February 10th and today until after you had gotten your shuffle and Mr. West had gone down and shuffled and then you objected or you said you were going to take it up with the judge; is that correct?

MR NELSON: I made the comment to Mr. West while the second shuffle was going on. I don't know what words I used, but I indicated a disagreement and Mr. West's comment was to take it up with the Court and I think that's probably all that was said on the subject.

MR. CUNNINGHAM: And this was supposed to have been the defense's shuffle?

MR. NELSON: It was one done at the defense's request, yes.

MR. CUNNINGHAM: That's all, **[1786]** Your Honor.

MR. WEST: Your Honor, my recollection of the incident was basically somewhat as Mr. Nelson has represented to the Court. No, I didn't say anything concerning the procedure that was used by Mr. Nelson. I haven't said anything for the past three weeks. I've used basically the same procedure.

Now, the State is saying at this point in time that, for some reason, the defense has done something with the panel in reference to placing them in some particular order.

MR. NELSON: Judge, I never said that. What I'm saying is, we feel that they should have been shuffled more thoroughly than they were.

MR. WEST: Judge, the fact of the matter is, it was the defense's shuffle at that point in time. MR. NELSON could have done **[1787]** what he wanted to do at the time that he had the right to shuffle and he did that. Then I turned around and did it according to how the defense wanted it

done. Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuffle wasn't done correctly.

MR CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first time, the black jurors were number **[1788]** nineteen, twenty-six, thirty-six, thirty-seven, thirty-eight and thirty-nine, that after the second shuffle those same six blacks are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to Mr. Cunningham telling the Court what this is all about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR WEST: Judge, Mr. Nelson was standing right by me when I shuffled. Now, he cannot dictate the number of times that the **[1789]** defense puts cards in or takes them out. I didn't try to dictate it at the time that he did it and he can't do it when I do it. Now, the facet of the matter is—and I'm putting it on the record—that for the last three weeks—specifically the week of the 10th we had black jurors on the front that the State immediately did a shuffle. They have a right to do that. The law provides for that. Both sides can shuffle.

Four jurors come up here the week of the 17th and they're black. They shuffle them with the jurors in the same order after his shuffle and they end up on the back row in the same order. Now, he's crying about the jurors after the defense does their shuffle that they're back on the first row.

They can sit as jurors. If they're qualified as jurors to sit in this particular case, then they **[1790]** should be able to do it without regards to race.

MR NELSON: Judge, at this point, if the defense wants to have it marked, they can have it marked, but Mr. Shipman prepared a chart of the differences between the second list and the third list which indicates the very minimal amount of shuffling that resulted this time and that's what I'm saying is, they were not shuffled as thoroughly as they should have been. If the Court would like Mr. Shipman to explain the chart or go over the chart with the Court, he can. I think it will make our position fairly clear.

THE COURT: Well, you—all can put anything that you want to into the record, Mr. Nelson, but I don't believe the Court has any authority at this time to order a reshuffling or to the quash this panel based on what I've heard, so I'm **[1791]** going to go with—

MR. NELSON: But under the Latham case, Judge, the only way the shuffle can be done the way it's been done the last two weeks and today is with the agreement of both parties.

THE COURT: I agree. That's the law.

MR. NELSON: The State has submitted that at the time I objected to Mr. West's procedure that terminated the agreement of both parties. Therefore, that shuffle is void and should be reconducted.

MR. CUNINGHAM: That might be all right except—

MR. WEST: He just said, "Don't you think you should shuffle them some more?

MR. CUNNINGHAM: Secondly, he's already gotten his shuffle. That's basically unfair

MR. MACALUSO: Well, Judge, **[1792]** if I understood Mr. West; is he saying at the time a particular side requests a shuffle, that side has complete control over the procedure of the shuffle? I need to be corrected on that, so there's no confusion in the future.

THE COURT: There won't be any confusion in the future. Next week; if we have any problems, I'm going to require that it be going to require that it be brought up here to the Court and the shuffle or whatever it may be be conducted in the presence of the Court, so if either side has an objection at that moment in time, it can voice it to the Court on the record and I can decide whether the shuffle was properly done or not. It won't happen again, I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to **[1793]** do it in the manner in which it was done in this case, so this is not something that has happened every time we have a jury shuffle. I'm sorry it didn't work out in this case.

MR. NELSON: I think my problem is, maybe you objected; but you didn't object promptly enough to cause me to stop the procedure when I could have stopped it and now I do not believe I can order a reshuffle,

MR. NELSON: I thought that I told the Court that we had a problem and there was some question about it and the Court indicated at that point that you wanted to go ahead and do the general voir dire anyway for time purposes by other persons checking on the situation. I thought we agreed with that understanding and that's why we did the general voir dire.

[1794] MR. WEST: Judge when did Mr. Nelson bring this to the Court's attention?

MR. NELSON: When all of us were back there before the general voir dire.

MR. WEST: Well; Judge; it was my understanding that the Court called all the attorneys into the clerk's office and asked if there was some sort of problem and Mr. Nelson said at that point in time, "I shuffled." and turned around and said that I had shuffled, There was no indication that there was a problem at that time.

THE COURT: The problem, Mr. Nelson; is, you didn't—you said, as I recall, that you weren't satisfied with the way the shuffle had been conducted or something like that, but

you didn't object to the location. That's what you're objecting to **[1795]** now. I'm going to have to overrule the State's object-tion on this. Next week it will not be done this way. We'll go with the list that you've got for better or for worse.

Let's bring Mr. Rand in. Mr. Rand, how are you doing?

MR. RAND: Fine, sir.

THE COURT: Mr. Rand, I'll ask you, as much as possible to make yourself comfortable it may not be possible under the circumstances, but if you can just do that, we would appreciate it, and answer the questions as I know you will Mr. Macaluso, go ahead.

MR. MACALUSO: Mr. Nelson is going to talk Mr. Rand, Judge.

* * * *

Chronological I N D E X
VOLUME I

Juror No.	Name	Page
1	Young, Cynthia K.	
	By Mr. Macaluso	55
* 2	Harris, Joe G.	83
3	Merrell, Dennis W.	
	By Mr. Macaluso	86
4	Hambrick, Donald J.	
	By Mr. Macaluso	104
	By Mr. Cunningham	145
5	Williams, Emily C.	
	By Mr. Nelson	152
	By Mr. Cunningham	184
6	Weigant, Darol L.	
	By Mr. Macaluso	196
	By Mr. Cunningham	235
7	Bozeman, Roderick R.	
	By Mr. Macaluso	273
	By Mr. Cunningham	318
* 8	Sumrow, Mary I. (See Volume V)	2402
	By Mr. Nelson	332
	By Mr. West	364
9	Fields, Billy J.	
	By Mr. Macaluso	397
	By Mr. Cunningham	438
*10	Riddle, R. Charles	458
	VOLUME II	
11	Gibson, Margaret M.	
	By Mr. Macaluso	478
	By Mr. Cunningham	515

12	Taylor, Carol A.	
	By Mr. Nelson	527
	By Mr. West	557
	By Mr. Nelson	562
	By Mr. West	566
*13	Carr, Vincent J.	593
14	Nelson, John D	
	By Mr. Macaluso	598
	By Mr. Cunningham	631
15	Sohner, Harold K.	
	By Mr. Nelson	668
	By Mr. West	698
16	Wagoner, Billy J.	
	By Mr. Macaluso	723
	By Mr. Cunningham	765
	By Mr. Macaluso	789
	By Mr. Cunningham	797
*17	Gitchaway, Hilbert	828
*18	Allen, Andrea L.	836
19	Smith, Virginia R.	
	By Mr. Nelson	922
	By Mr. West	955
	By Mr. Nelson	980
	By Mr. West	987
20	Holtz, James D.	
	By Mr. Macaluso	1012
	By Mr. Cunningham	1054
	VOLUME III	
21	Jenkins, Sandra L.	
	By Mr. Nelson	1070
	By Mr. West	1102
22	Moses, Colleen	

	By Mr. Macaluso	1130
	By Mr. Cunningham	1169
	By Mr. Macaluso	1192
	By Mr. Cunningham	1196
23	Crowson, Penny M.	
	By Mr. Nelson	1207
	By Mr. West	1241
24	Smale, Gwendolyn M.	
	By Mr. Macaluso	1255
	By Mr. Cunningham	1291
	By Mr. Macaluso	1317
	By Mr. Cunningham	1324
	By Mr. Macaluso	1331
8	Sumrow, Mary I.	
	By Mr. Nelson	1344
	By Mr. Cunningham	1348
	Morrone, Dr.	
	By Mr. Nelson	1354
	By Mr. Cunningham	1360
25	Long, Ronnie	
	By Mr. Nelson	1369
	By Mr. West	1399
26	Berk, Linda M.	
	By Mr. Macaluso	1437
	By Mr. Cunningham	1468
27	Desinise, Dominick	
	By Mr. Nelson	1480
28	Warren, Joe A.	
	By Mr. Macaluso	1519
	By Mr. Cunningham	1553
*29	Weatherly, Thomas	1560
*30	Randle, Dora	1560

VOLUME IV

*31	Thal, Carolyn (See Volume III)	1560
*32	Morrison, Leo (See Volume III)	1560
33	Vickery, Noad O.	
	By Mr. Nelson	1564
	By Mr. West	1596
	By Mr. Nelson	1627
	By Mr. West	1633
*34	Bogart, Robert	1636
35	Hinson, Gene R.	
	By Mr. Macaluso	1640
	By Mr. Cunningham	1670
*36	Weaver, Kenneth	1636
37	Rand, Edwin	
	By Mr. Nelson	1796
	By Mr. West	1830
38	Butler, Jeanette	
	By Mr. Macaluso	1866
	By Mr. Cunningham	1905
39	Carter, Louise	
	By Mr. Nelson	1948
	By Mr. West	1977
40	Boggess, Carrol	
	By Mr. Macaluso	2000
	By Mr. Cunningham	2038

VOLUME V

41	White, Sheila	
	By Mr. Nelson	2050
	By Mr. West	2073
42	Weiner, Joan E.	
	By Mr. Macaluso	2103
	By Mr. Cunningham	2142

43	Kennedy, Wayman A.	
	By Mr. Nelson	2170
	By Mr. West	2203
44	Salsini, Ronald P.	
	By Mr. Macaluso	2242
	By Mr. Cunningham	2276
*45	Alves, Patricia L.	2301
46	Mazza, Marie H.	
	By Mr. Macaluso	2304
	By Mr. Cunningham	2336
*47	Mullen, Max H.	2342
48	Nix, Chatta J.	
	By Mr. Nelson	2345
	By Mr. West	2377
*49	Burnett, Carolyn J.	2403
*50	Miller, Vergie	2399

VOLUME VI

*51	Sustaita, Evangelina (See Volume V)	2401
52	Witt, Mary	
	By Mr. Macaluso	2408
	By Mr. Cunningham	2445
*53	Pasher, William V.	2465
*54	Roberts, Carolyn D.	2465
*55	Holley, Oscar M.	2767
*56	Salapong, Emerlinda	2768
*57	Doiron, Rosamond G.	2768
58	Girard, Leta J.	
	By Mr. Nelson	2518
	By Mr. West	2545
59	Evans, Clara A.	
	By Mr. Macaluso	2580
	By Mr. Cunningham	2614

*60	Wingert, Mitzi R.	2647
	VOLUME VII	
61	Mosley, Jerry W.	
	By Mr. Nelson	2651
	By Mr. West	2678
62	Williams, Doris J.	
	By Mr. Macaluso	2743
	By Mr. Cunningham	2785
*63	McDonell, Rosemary J.	2822
*64	Goeters, Adrienne E.	2740
*65	Moore, Bedford F.	2822
*66	Stradley, Laura D.	2822
*67	Collier, Lourice	2824
68	Sztybel, Vivian L.	
	By Mr. Nelson	2825
	By Mr. West	2856
*69	Yonts, Martin L.	2909
70	Smith, Charles M.	
	By Mr. Macaluso	2913
	By Mr. Cunningham	2950
	VOLUME VIII	
71	Baker, Linda C.	
	By Mr. Nelson	2985
	By Mr. West	3015
*72	Ingersoll, Helen R.	301
73	McDowell, Debra S.	
	By Mr. Macaluso	3020
	By Mr. Cunningham	3057
*74	Dykstra, Christiann	3082
75	Willard, Joyce F.	
	By Mr. Nelson	3088
	By Mr. West	3119

76	Webb, Virginia M.	
	By Mr. Macaluso	3157
	By Mr. Cunningham	3195
*77	Mader, J'Ann	3258
78	Duke, Kevin C.	
	By Mr. Nelson	3260
	By Mr. West	3293
79	Wolters, Louis G.	
	By Mr. Macaluso	3322
	By Mr. Cunningham	3360
*80	Terry, Johnnie	3417
	VOLUME IX	
*81	Horn, JoAnn	3431
82	Davis, Cheryl A.	
	By Mr. Nelson	3433
	By Mr. Cunningham	3466
*83	Rhea, Earl J.	3500
*84	Reyes, Helen	3501
85	Spence, Gary D.	
	By Mr. Macaluso	3503
	By Mr. Cunningham	3555
*86	Cargile, Karen D.	3585
*87	Stewart, James D.	3585
*88	Jester, Michael	3660
*89	Bankston, Mary	3660
*90	Boleman, Lawana	3660
	VOLUME X	
*91	McGowan, Mrs. Robert (See Vol. IX)	3657
92	Pincus, Mildred C.	
	By Mr. Nelson	3666
93	King, Carol B.	
	By Mr. Macaluso	3677

	By Mr. Cunningham	3716
94	Whaley, Charlotte	
	By Mr. Nelson	3744
	By Mr. West	3776
*95	Skarsten, Norman E.	3783
96	Barnard, Catherine C.	
	By Mr. Nelson	3784
	By Mr. West	3817
*97	Mantooth, James (See Volume IX)	3660
98	Woods, Troy L.	
	By Mr. Macaluso	3837
	By Mr. Cunningham	3876
99	Page, Susan K.	
	By Mr. Nelson	3884
	By Mr. West	3916
100	Mackey, Janice	
	By Mr. Macaluso	3942
	By Mr. Cunningham	3974
101	Walsh, Brenda G.	
	By Mr. Nelson	4028
	By Mr. West	4068
102	Bailey, Paul	
	By Mr. Macaluso	4102
	By Mr. Cunningham	4143
103	Jones, Russell L.	
	By Mr. Nelson	4171
	By Mr. West	4201
104	Zablan, Filemon P.	
	By Mr. Macaluso	4240
	By Mr. Cunningham	4278
105	Keaton, Anna L.	
	By Mr. Nelson	4301

	By Mr. West	4335
106	Gutierrez, Fernando	
	By Mr. Macaluso	4377
	By Mr. Cunningham	4408
107	O'Dell, Max W.	
	By Mr. Nelson	4452
	By Mr. West	4485
108	Hearn, Sandra R.	
	By Mr. Macaluso	4537
	By Mr. Cunningham	4575

* Denotes Excused

RODERICK R. BOZEMAN,

[273] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Bozeman. Mr. Bozeman, let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

THE WITNESS: Good morning.

Q You may recall being introduced the other day to Norman Kinne. He was seated over here to—it would have been your far right at the time. The three of us are assistant criminal district attorneys here in Dallas and we work for Henry Wade who, I'm sure you know, is the district attorney. We've been designated as the lawyers who will represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham—

[274] MR. CUNNINGHAM: How are you?

THE WITNESS: Good morning, sir.

Q —and to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning, sir.

Q You may also recall being introduced to them. They are the defense attorneys who have been appointed by His Honor Judge McDowell to represent the accused Defendant in this case. His name is Thomas Joe Miller-El. He is at your very far right in the powder blue suit.

The reason why I've taken the time to reintroduce you to everyone here is to let you hear our names again. I want to ask you if you recognize any one of us or have heard of any one of us other than common introductions?

A No.

Q Okay. Of course, I also did that to reacquaint you with the roles that we are playing in this particular case. Now, as you know, at this [275] particular point, Mr. Bozeman, you are a prospective juror in this capital murder case. Mr. Miller-El is charged by indictment with the offense of capital murder, the most serious level of offense under the laws of this state. That is, it's serious because of the nature of the offense, of course, capital murder, and it's serious because of the two possible penalties a person can receive if he or she is convicted of this offense. Okay?

As you well know, if a person is convicted of capital murder, they can receive either only a sentence of death or a sentence of life. Because of that, the law basically allows us to talk to you individually such as we're doing now.

Have you been down here on jury duty before?

A No, I haven't.

Q If you had, and you had been called on in any other case other than a capital murder case, the lawyers would have an opportunity to talk with you and ask you certain questions, but the conversation that you would have with the lawyers would have been [276] conducted while you would be sitting out there in the gallery much as these people are and as much as you were on Monday. The answers you give would be the answers you would give in the presence of forty or fifty virtual strangers. All right?

A Yes.

Q You can see how it might kind of make you a little bit

nervous or inhibit you or not relax you as much as we want you to be, so they let us talk to you individually because it's a little bit more quiet. I imagine, after a period of time, some of these people will—won't be out there and we will be a little more relaxed. Let me invite you to do that, relax as much as you can, and take a deep breath if you're a little bit nervous.

Let me remind you of something that the Judge said earlier. There are no right or wrong answers to any of the things we're going to be talking about. You're not here to please anybody and no one is going to argue with you or quarrel with you about anything or talk you into anything or out of anything. Your feelings, your impressions, and [277] your position, basically, are the things we're going to talk about and are the most important right now. We want to know how Mr. Bozeman thinks. It doesn't matter what we think. We want to know how you think, okay?

A Yes.

Q If you have a question about anything, Mr. Bozeman, by all means ask it because this is the time that you get to do that, all right? If there's a statement you would like to make or something you feel that you need to tell us in fairness to both parties here, then by all means do that, too. Will you do that?

A All right.

Q Okay. Let me tell you what our position is right from the outset here. Sir, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. I want to let you know that from the very outset so you know exactly where we stand and what our position is going to be with regard to the evidence that is presented. We are actively seeking the death penalty in this case and that means that we intend to provide a jury, once [278] it's selected, with both the type and the quality of evidence that will convince them beyond a reasonable doubt that the Defendant is guilty just exactly as he's charged.

Then in the second part of the trial where the punishment is determined, either death or life, we once again intend to be able to provide this jury with the type and the qualify of evidence that would convince them beyond any reasonable doubt that these questions that make that determination should be answered yes.

You know that three yes answers or all yes answers, that equals an automatic and mandatory sentence of death.

Now, that's why I'm just telling you from the very outset, as we're going to tell all the prospective jurors, what our position is so it wouldn't come to you as any surprise if you're actually on the jury.

You understand that, ultimately, it's the jury's decision, not our position or their position, that really counts. Okay?

A Yes.

Q Now, Mr. Bozeman, I know you've been asked this question here on the [279] questionnaire and, as the Judge said, this saves us a great deal of time because otherwise, we would probably have to ask you all these questions and tie you up for much longer than you would want to be tied up.

Let me ask you at this point if you would share with us, sir, in your own words, your feelings generally about the death penalty and capital punishment and how you personally feel about it and then, secondly, if you would share with us your feelings about whether you could actually serve on this type of a jury?

A Well, as far as the death penalty is concerned, I think it would, you know, depend on the circumstances involved in what happened, you know, whether I could say I would actually vote for that or not. Yes, I think I could, but, you know, I don't really know at this point. I'm sure I could, but as far as the death penalty is concerned, I would have to know, you know, the circumstances surrounding it.

Q Let me just ask you, as a general proposition, how do you feel about the death penalty? I understand what you're saying, it would depend on the facts and circumstances, but as a general [280] proposition, how do you view the death penalty, how do you feel about it? I mean, do you think it serves a purpose in our society? Do you think we ought to have it?

A Yes, it does.

Q What sort of purpose do you feel it serves?

A Well, I think if there's no possible way to rehabilitate a person and he is harmful to society, you know, the State has that right, I feel.

Q You said, if there was no possible way to rehabilitate somebody. Let me ask you: What would be some indication to you, Mr. Bozeman, that someone was beyond rehabilitation?

A Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that.

Q Would, for example, repeated criminal violent conduct be some indication to you, sir, that the person was beyond rehabilitation?

A No, not really. It would, I **[281]** guess, depend on the extent of the crimes that he has committed and if they were, you know, violent crimes over a period of time, different—yes, I believe that it would.

Q In other words, if you see a pattern developing, let's say, in a person's life where he tends to commit violent offenses when released into society, do you feel that is the type of person that you would be able to decide is perhaps not even worthy of or capable of being rehabilitated?

A Yes.

Q Now, let me set out a proposition here. I hesitate to do this because I don't like to pidgeonhole you, but sometimes it serves a purpose. With regard to the death penalty, we've found basically that we could probably categorize people generally speaking in three categories, and in no particular order. Let's say a type of individual who believes in the death penalty and also believes—knows himself well enough to know that they could actually serve on a jury and, if the situation called for it, could actually make a decision that would result in someone **[282]** actually receiving the death penalty. They believe in it and they could actually implement it, in other words, on a jury.

Let's say another class of individual, again in no particular order, believes in the death penalty as a proposition, but let's say when it comes to them actually serving on a jury, because of their personality or their temperament or whatever it may be, whatever the fact is, they just don't feel they

could actually be the one to do it, could actually make the decision. They agree with it when they read about it in the paper and they agree with the philosophy, let's say, but they couldn't actually serve on the jury.

Let's say there's another class that doesn't believe in the death penalty and could never serve. I gather you' re not in the third category, but do you see yourself in either one of the first two?

A Oh, probably more the second group, I guess.

Q All right. We need to talk about that just a little bit. Mr. Bozeman, let me explain something here so it doesn't sound like **[283]** I'm rattling on endlessly and covering the same thing repetitiously. When we talk, no matter what we're talking about, and I'm asking you questions and you're answering, you're really talking to everyone here. You're certainly talking to the other lawyers and you're certainly talking to the Judge and, of course, to the court reporter who is taking down everything in this case for appeal purposes, okay, so it's necessary, legalistically speaking, that I ask some things and you'll say, "Why does he keep asking that?" or "Why does he keep going over that? He's repeating himself." or "Haven't I made it clear?" You may well have, but the law simple requires that we go into very tedious and minute detail on some of these things. The lawyers are already tired of hearing me talk and I know the Judge is, but it's really more important that you talk. When I ask you questions, it's very important that you—I don't know how to put this delicately—not equivocate in your answers. If you can answer something yes or no, that's certainly the best way. Okay? I'm not trying to force you to answer, but do you **[284]** understand that it is very difficult for the Judge to make certain decisions in regards to a juror's service if someone says, "Well, maybe I could." or "I probably could." or "I possibly could." Do you see what I'm getting at?

A Yes.

Q Now, I'll give you all the time you need to think about any answer that you're going to give, okay?

A All right.

Q I know it's kind of confining, isn't it, but it's just necessary. All right?

A All right.

Q Now, you said that you see yourself fitting more into that second category. Is that because—we've already discussed how you feel about the death penalty. Is it because of your possibly serving or hesitance to serve on the jury itself, or just what is it?

A No. It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

[285] Q You think you would have some problem?

A No, I don't think I would.

Q Oh, you don't think you would. Okay. Well, here's the thing. We have to rely—every one here has to rely on every thing you tell us and when you say—again, when you say probably, I know that's probably how—you see, I just said it there. I guess that's how I would answer the question, too, if I had some reservations, but every one here has to rely now on what you're going to do, within the law, of course, and based on the evidence back when you're on the jury. It would be terribly unfair to either or both sides, if some prospective juror said, "Well, maybe I could do this," or "Maybe I could do that." and then to find out later on that person couldn't do that, you know, under the law, follow the law, when they're actually on the jury. We've got to rely now on what you say. Are you saying that you feel you could?

A Yes, I could.

Q All right. Again, I want you to understand that I'm not trying to talk you into [286] any position, okay?

A No.

Q So you feel that you actually could serve on this type of a jury?

A Yes.

Q And understanding now that in years past with regard to the death penalty—I think you know and it's common knowledge that for many, many years—I say many, many years, ten or fifteen years, maybe more than that—no one was executed, I believe anywhere in the United States for about ten or fifteen years even though death penalties were handed down—

MR. CUNNINGHAM: Your Honor, we'll object to that. What the law was ten or fifteen years ago has no relevance to what we're doing right now.

THE COURT: I'll overrule, Mr. Cunningham. I think you're making a good point, though. Overruled.

Q The point I'm trying to make is, we would expect, as I'm reasonably sure you [287] understand at this point, if a verdict were to result in this case of a sentence of death, a juror should realistically expect now, in 1986, that that sentence would be carried out, whereas years ago, you might have been on a jury and said, "Well, they're not executing anybody. You know, we're getting death penalty cases and hand down a verdict, but no one is being executed." You know, it's kind of like who cares or what's the difference, he's never going to be executed.

Do you understand that you should reasonably expect that, if you were to return a verdict that resulted in the death penalty, Mr. Miller-El, in this case, would be taken to Huntsville, Texas at some point in time and given a lethal injection and executed under the law. I think you understand that, do you not?

A Yes.

Q I mean, the seriousness of the situation?

A Yes, sir.

Q Knowing that, do you feel you still could serve on this type of a case?

A Yes, I could.

[288] Q All right. Now, let's talk a little bit about capital murder. You understand, when we talk about murder, the offense of murder is part of the offense of capital murder. Let me explain that. We have an offense known simply as murder under the laws of this state. Murder is a situation where one person, knowingly or intentionally, causes the death of another individual and that's done without any legal excuse or any legal justification, all right? But not all murders—murder is not a capital offense. You can't receive the death penalty in Texas just for murder. Am I making myself clear, Mr. Bozeman? To be eligible for the death penalty, you must commit murder under a certain set of circumstances or you must murder a particular class of individual. I'm sure you know some of what I'm talking about.

For example, if I murdered—if you murdered me outside in the hall here because we get in an argument, you couldn't receive the death penalty for that or vice versa, if I killed you.

All right? Now, if I was a police officer or a fireman in the line [289] of duty, that's a capital murder. Do you see what I'm getting at.

A Yes.

Q —or if you kill a jail guard or kill someone while you're escaping from a penal institution, a jail or penitentiary, things of that nature. If you kill a number of people in one episode, that's a capital murder. If you kill someone for hire, it's capital murder. If you commit murder also in conjunction with the commission of another very serious felony, such as we've alleged here, murder during a robbery—in other words, murder plus, murder during a burglary, murder during a rape, arson, kidnapping—do you see what I'm getting at?

A Yes.

Q Murder plus. We have to prove both the murder and the aggravated offense, robbery, burglary, rape and so forth. Then murder, which is a first degree felony, is then

elevated up the level of a capital offense for which you receive only the death sentence or a life sentence depending on certain factors.

Now, let me ask you: How does that square with your way of thinking, sir, [290] generally of what a death penalty case ought to be, depending upon the facts? Do you think those are the types of offenses that you feel, depending on the facts and circumstances, the Defendant's background, the way the crime was committed—do you feel those are the types of cases that the death penalty ought to be in order for or would you add to that or subtract from it, would you modify it in some way?

A No, I would say yes. Yes, those are the offenses.

Q Okay. Would you add to that? I know you've given it some thought, but do you think you would add something to it? Some people say, "Well, they ought to get the death penalty for sexually abusing little kids.", you know, at least the possible death penalty for it, maybe not in all case, but it ought to be available, or selling dope and getting little kids hooked on heavy dope or beating up and abusing old people and stuff like that.

A I don't believe those should be.

Q Okay. Would you pretty much limit it the way it is?

A Yes, I would.

[291] Q All right. Now, you understand that the trial of a capital murder case is conducted pretty much in the same fashion as any other case, any other criminal case. That is, it's conducted in two parts. The first part deals only with whether the person is guilty or not guilty. The State has the burden of proof. We must convince you beyond a reasonable doubt that the Defendant is guilty, in which case, you find him guilty. If we don't prove that, you find him not guilty. It's as simple as that. If you find him not guilty, the trial is over and everybody goes home. If, on the other hand, you're convinced beyond a reasonable doubt that the Defendant is guilty of capital murder as he's charged here, then we go on with the second part of the trial. You may hear additional

evidence to aid you in the second part of the trial and you may not. Either side or both sides can bring you additional evidence, but no one is under any obligation to bring you any additional evidence. You may be in a position where you would decide the answers to the questions, which we'll talk about in a minute, on the **[292]** basis of the evidence that you received in the first part of the trial because the law does allow you to do that.

Now, the second part of the trial, under the old law, up until about fifteen years ago, I guess it was, or somewhere around there, after the jury heard all the evidence, the jurors would go back and actually directly decide should a person get the death penalty, should they get a life sentence or should they get some number of years. If that's the way you felt and you felt, on the basis of the evidence, that someone ought to die and all the other jurors agreed agreed, you wrote in death or life or some number of years, okay?

Now, that changed about some fifteen years ago—maybe not that long ago. Instead, you don't make that decision directly. You make the decision indirectly on the basis of the answers to three questions that you're called upon to answer and, you see, the law requires the Judge to take an automatic and mandatory course of action. Am I making myself clear?

[293] A Yes.

Q I think the Judge explained this rather adequately the other day, but I just want to go over it again. You understand that it boils down to this: Just as we had the burden of proof in the first part of the trial to convince you that the Defendant is guilty and, if we proved that, you unanimously found the Defendant guilty, the same thing holds true for the second part. We have the burden of convincing you, since we're seeking the death penalty, that those questions should be answered yes. If we do, your oath as a juror will require you to answer the questions yes which you know, three yes answers or all yes answers, means an automatic sentence of death. Judge McDowell has no power under the law to override or change your verdict. You write a

letter to him, basically. Three yes answers is automatic death. He can't say, "Well, I disagree with you. I'm going to give him a life sentence."

The same thing would hold true if you answer one or more of the questions no, an automatic life sentence. Whether the Judge agrees or disagrees, it doesn't matter. He **[294]** will follow that particular order that you give him based on those answers. Okay? Any problem with that procedure?

A No.

Q Okay. Now, let's look at the questions very briefly. Take whatever time you need, Mr. Bowman, to look over those questions and we'll talk about them in just a minute.

A (Juror complies.)

Q Did you get a chance to read all three of them?

A Yes.

Q Did they cause you any problems at all or do you have any questions about any of the three questions?

A No.

Q Do you understand, as I said earlier, that we have to prove those to you. We have to bring you evidence or there has to be evidence presented during the trial that would convince you that those questions should be answered yes beyond a reasonable doubt?

A Right.

Q Is there any reason why you couldn't—allowing that I cannot go into the **[295]** evidence of this particular case. We're just talking in generalities, sir. Is there any reason why you couldn't answer that first question yes or no depending upon the type of evidence you received, you know, whether someone acted deliberately with the reasonable expectation that the death of somebody would result? Any reason why you couldn't answer that question yes or no?

A No, there's not.

Q Can you see that the type of evidence you would probably need to receive to answer that question would be given to you in the first part of the trial when you learn about how the offense was actually committed and what role the Defendant had?

A Yes.

Q Okay. Question number two, does that cause any problems at all? That kind of looks toward future behavior, doesn't it—

A Yes.

Q All right.—you know, is there a probability that he would commit some criminal acts of violence that would constitute a continuing threat to society. Do you think **[296]** that question can be answered? Well, let—

A Yes.

Q —me put it this way: You know it can—you think it can?

A Yes.

Q What sort of evidence do you feel would be valuable to you? If you could just tell us, what do you think you would want to know about somebody that would aid you to answer that question yes? What would be the most valuable to you?

A I would probably want to know what he's done in the past and the degree of violence that was involved in those acts.

Q Do you think that would aid you?

A Yes.

Q Do you think, of course—and it's probably reasonable that what you learn about what he did during the actual commission of the crime, actually before the crime in preparation for it, during the crime itself, and then maybe how he reacted afterwards?

A Yes.

Q Do you think that's a pretty good barometer sometimes, how a person reacts after **[297]** a crime, either remorseful and contrite or are they just kind of nonchalant about it and couldn't care less?

A Yes.

Q Do you think that kind of gives you some insight into what type of person you're dealing with and what—you mention this thing earlier about rehabilitation. You will notice that there is nothing in any of these questions about rehabilitation?

A No, there's not.

Q All right. Do you understand that you're bound, just like we're bound, by these three questions? Do you feel that your personal feelings about rehabilitation would interfere in any way with the answers to those questions or do you feel number two maybe looks towards rehabilitation, although it doesn't use that word rehabilitation or rehabilitate?

A I guess it's like you were saying. It would depend on the demeanor of the person, you know, that actually committed the crime, whether he would actually—or there was a chance for him to be rehabilitated or not.

Q All right. You said earlier, if **[298]** you thought there was a chance that someone could be rehabilitated, you didn't think they should receive the death penalty?

A Right.

Q Let me just ask you—and I don't mean to play word games with you because a lot of times it sounds like that's what we're doing, especially these questions. You see, the Judge can't further define these questions for you. He can't give you any guidelines and neither can I, for that matter.

A Right.

Q He certainly would be in a better position, but he can't. The law does not permit him to do that and the lawyers can't, either.

A Okay.

Q But do you feel your feelings about rehabilitation would in any way conflict with your answering that question, number two?

A No, I don't think they would.

Q Now, number three is a question that may or may not be given to you. It depends on whether or not some evidence is raised by any kind of provocation. Can you see **[299]** how that question could be answered yes or no depending on the type of evidence you receive?

A Yes.

Q Let's shift gears for just a second and let me back up on one thing. Do you remember what I said, years ago in a capital case, the jury was actually expected to express their own opinion as to whether or not somebody should live or die. You know, if you had a particular feeling, as you sat over here and listened to the evidence, he let you voice that, "I think that guy ought to die." or "I think or "I think he ought to get life." or "I think he can be rehabilitated.", whatever the case may be. Do you understand that you can't do that now?

A Yes.

Q The law expects that these three questions be inserted between you and the Defendant in a death sentence or a life sentence, that you put aside your personal feelings and be rather—I hate to use the word. It may be inappropriate, but—pretty scientific, I guess, just look and see if the proof is there, if it measures up, **[300]** measures up to an answer beyond a reasonable doubt. If it does, answer the question yes. If it doesn't, you answer the question no, regardless of your personal feelings. Can you see—I'm not saying that this would ever occur, Mr. Bozeman, but can you see how you might be on a jury and you might have a personal desire after you heard the evidence, a personal desire that the person would die or—a personal desire that the person should receive a life sentence? But yet, you see, when it comes time to answer the questions, let's say if you're intellectually honest with regard to answering the questions—let's say you're

on a jury and you say, "Well, I think the guy ought, to die after I've heard this. This is horrible. I think the guy ought to die. It scares me, the thought of him being out on the streets again." But then you look at question one or two or three and actually, in all honestly, you say, "Well, as much as I want it done, the proof is just not there in all honesty. I'll have to answer one of those questions no." Could you go ahead and do that knowing it would result in a life sentence and **[301]** not a death sentence?

A Yes, I could.

Q Let's flip that over. How about in a situation where you're on a jury and you say, "Well, this is a capital murder technically, but I don't think this is the type of capital murder that someone ought to die for." Yet, on the other hand, when all the evidence is in, you see that those three questions, beyond any reasonable doubt, should be answered yes, knowing full well that will result in the execution of somebody who you personally don't desire to be executed—do you see what I'm getting at?

A Yes.

Q Could you go ahead and do that, in all honesty?

A I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

Q Okay. We need to pause here for just a second because, obviously, you can see how crucial and critical that is to all of us here. I said, I'm not going to yell at you or **[302]** quarrel with you or try and talk you into or out of anything. I want to make sure you understand that. I think you're being honest with us and I know you've given it some thought. I just want to be sure. As I said earlier, we're going to have to pin you down on your position. And bearing in mind that I believe you have given it some thought since you were down here on Monday—you have, haven't you?

A Yes.

Q All right. I believe you just told us, that if you were in a situation where you had a personal feeling that a per-

son—you know, we know you're not a robot. We know that, when you sit over here, you're a human being and you're prone to having personal opinions about certain evidence or the desire of a particular situation. Are you saying, that if you, in all honesty, were on a jury, on a hypothetical jury, and you, in your heart, felt that person should not die, yet when you went to answer these three questions, even though, let's say, intellectually there was proof to satisfy you, number one, beyond any **[303]** reasonable doubt, he acted deliberately and with the reasonable expectation that someone would die, you would have to answer that question yes, and as far as number two, as much as you didn't want to answer that one yes, you would say, "Yeah, I want to be honest about it. I think there's a probability he probably would commit some criminal acts of violence, in which case the law would expect you to answer the question yes, and let's say, in number three, there's no provocation, the poor victim, he didn't do anything to provoke anybody, I'd have to answer that one yes, yet when it comes down to looking at those three questions and knowing that yes, yes, yes, is the same as writing death, you understand that the net effect is the same and that's contrary, completely contrary to what you desire, in honestly, Mr. Bozeman, if you're kind of gut—wrenching about it now, as we sit here now, knowing what kind of pressure would be on you—

MR. CUNNINGHAM: Your Honor, we'll object to that last statement. There's no indication and there's no evidence and it's **[304]** outside the record and it's speculating on whether or not that would be any pressure.

THE COURT: I'll overrule. I'll let Mr. Bozeman make up his mind on that. I think he's answered all the questions I've heard so far very thoughtfully and intelligently, Mr. Bozeman. If any question posed by a lawyer doesn't seem understandable to you, don't hesitate to say so. I'll overrule the objection, Mr. Cunningham.

Q Do you see what I'm getting at? You're not under the same kind of pressure, reasonably, that anyone would understand would be on the situation when you're making a

life or death decision back in the jury room with eleven other people. Do you really feel you could put aside your personal feelings or, as you said earlier—you said you didn't think you could?

MR. CUNNINGHAM: Your Honor, we'll object to that last **[305]** statement. He's gone through those three questions and he said he could answer yes if the facts and circumstances proved beyond a reasonable doubt that the answer should be yes. He said that several different ways.

THE COURT: I'll overrule, Mr. Cunningham. I'll let him answer the questions. You might want to reask it, Mr. Macaluso, to make sure it's clear to Mr. Bozeman. I think he said a moment ago that he might have some problems with it because he would be hesitant about someone receiving the death penalty.

MR. CUNNINGHAM: Your Honor, I would hope that every juror that was sent over there will have some problems with it. The issue is, if he hears the proper facts and circumstances beyond a reasonable doubt, that the answer should be yes to number one, that he would **[306]** do that.

The same thing for number two and the same thing for number three.

THE COURT: I agree. With that statement of law, I'll let Mr. Macaluso reask the question, if he wants to, in case Mr. Bozeman needs to be refreshed.

Q I can barely remember the question. I think it came down to, you said that, if you felt one way, but the proof was another way—

A I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it.

Q Let me shift gears here away from, what we call—we've talked about capital murder and mandatory life or death—and—talk about a situation that I'm not saying would necessarily occur in this case or any other case, for that matter, Mr. Bozeman, but we need to discuss it now because we have the opportunity.

Imagine for a second that you're **[307]** on a capital murder jury and let's say it's a capital murder that is allegedly a murder during a burglary, let's say, because it's a type of capital murder, or it could be during a rape, I guess. Let's say that you heard all the evidence in the first part of the trial and you and the other jurors were convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you didn't hear any evidence about a burglary or you have a reasonable doubt. You're just not sure about whether that burglary—it was actually murder during a burglary. Do you understand, if that were to occur, you couldn't convict someone of capital murder because the State in that case didn't prove a capital murder to you, did they?

A Right.

Q All they proved was what?

A Was the murder.

Q You got it. In such a situation you find the Defendant not guilty of capital murder simply because it wasn't proven to you, both parts were not proven to you. You find him guilty of what was proven to you and that's murder, as you've already said. Were that to **[308]** occur—imagine for a second that you're in a hypothetical situation now where that happened. The range of penalty for murder is altogether different. It's no longer mandatory life or death. Instead, it's the broadest range of punishment provided for under our penal code and our penal system.

Let me just ask you—let me talk a little bit about what murder is. I said earlier that murder is a situation where one person knowingly or intentionally causes the death of another individual. Okay. Let me go on to explain, so we're clear on this and you're clear on this, that that is a situation where this homicide occurs, this killing occurs, without any legal excuse or any legal justification whatsoever. All right? By that I mean, we're not talking about a situation where you believe someone acted in self-defense, whether it's, if I kill Mr. Nelson or you kill me because you think you're in fear of serious bodily injury reasonably or death—and the

law gives you the right to kill me. You could be charged with murder, but it wouldn't be murder if the jury believed that **[309]** you acted in self—defense or I did. Do you see?

A Right.

Q Forget about self—defense when you talk about murder. The same thing would hold true for, if you believed it was an accident. Now, I could kill Mr. Nelson or you could kill somebody. It was an accidental thing. You could be charged with murder, but if the jury believed it was an accident, it's not murder. A person has to be found not guilty just as he would be if you believed he was acting in self—defense.

The same thing would hold true if you thought someone was insane. As much as people have reservations about the insanity defense, if you honestly believe or have a reasonable doubt that somebody was insane at the time of a homicide, you can't convict him of murder.

Lastly, don't be thinking about a situation where someone acts in the heat of sudden passion. As an example, somebody comes home and finds out, God forbid, that their child was sexually abused or something like **[310]** that happened, something bad, and he picks up a gun and goes into a rage and goes down the street and kills somebody. Do you see what I'm getting at?

A Yes.

Q That's a homicide, but that's a lower grade of homicide. That's not murder, if you believe that, if you're on a jury. Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. I can't give you any other examples. Let me ask you—I gather from what you said, of course, and it's reasonable that anybody would feel this way, that you think murder is a very serious grade of offense.

A Right.

Q Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question in asking this prospective juror what the minimum **[311]** punishment is without telling him what the state legislature has set as the minimum punishment, that being five years to ninety-nine or life .

MR. MACALUSO: I intend to do that, judge. I'm just asking the jury what he—

THE COURT: Well, go ahead. I'll overrule the objection. I understand.

Q What do you personally feel ought to be the minimum when somebody commits a murder and it's not self-defense and not an accident and not insanity and not in the heat of sudden passion?

MR. CUNNINGHAM: Your Honor, we would still object to the form of the question. It's an improper question, the way he has asked the juror.

THE COURT: I'll overrule, Mr. Cunningham, in this particular situation. I'll overrule and say no more.

[312] A I would say twenty years, I guess.

Q You understand that in a murder case you would be allowed to consider all the facts and circumstances surrounding it, but I want you to understand that you still exclude those four different categories we talked about. Am I making myself clear?

A Yes.

Q Now, Mr. Cunningham is right that the range of penalty is, as I said earlier, very, very broad to encompass a wide variety of situations. As I said earlier, we want to know how Mr. Bozeman feels.

The range of penalty for the offense of murder is, under the law, as low as five years and all the way up to ninety-nine years or life. The law does allow the jury to consider all of the facts and circumstances surrounding the situation

where a person murders another person. It boils down to this, Mr. Bozeman, I just want to know what Mr. Bozeman's feelings are and you said that twenty years ought to be the minimum; is that correct?

A Yes.

Q Mr. Bozeman, let me ask you—I **[313]** can't give you a fact situation, sir, "Well, Mr. Bozeman, what would you do here?" or "What would you do here?" "What if this happened, what would you do here?" That's not proper for us to do that, either side to do that. Are you saying, sir, that you would ever feel, knowing yourself, it would ever be proper under any facts and circumstances where one person murders another person, absent of those other circumstances, to ever give a sentence as low as five years? Do you feel it would ever be proper under any circumstances?

A No, not if it was murder.

Q As I said earlier, Mr. Bozeman, it's not my position, my responsibility, or my desire to talk you into or out of a position and I think it holds true certainly for Mr. Cunningham and Mr. West when they talk to you. As I said from the very outside, we want to know how Mr. Bozeman feels. Let me just make sure we're clear on this. Are you saying that you—and we know you haven't heard any facts surrounding any hypothetical murder and we can't give you any, but are you telling us, telling the Court, telling the Judge, that you **[314]** do not feel it would ever be proper under any facts and circumstances, whether you can imagine them or not, to ever give as low as five years for a situation where one person knowingly or intentionally causes the death of another, no legal excuse, no legal justification whatsoever, no insanity, no heat of sudden passion, no self-defense, no accident, you're saying you could never do that?

A Yes, I could, but, like I say, it would depend on the circumstances. Say, the person who was doing the commission of the act, say he panicked and he was trying to, you know, flee the scene and something happened that caused the death, you know, that really it was indirectly. It was his

fault, but he didn't do it with malice, then I could say, yes, probably five years could be in order.

Q Bear in mind that we're talking about a knowing or intentional act.

A Oh, no, I don't think so. No.

Q Okay. Well, you see, you said, "I don't think so." Are you saying you could or you could not, sir?

[315] A (No response.)

Q For the knowing or intentional killing of another human being?

MR. CUNNINGHAM: And he believed from the facts and circumstances of that case, that that was a proper verdict, Your Honor.

A Yes.

Q Yes, you could or you could not?

A I could.

Q You could?

A Yes.

Q For a knowing or intentional—

MR. WEST: Your Honor, this is being repetitious. We've gone over it two or three times. He's already answered the question that he could, under the proper facts and circumstances as he deemed them to be, he could give a five year sentence. This is getting to be redundant at this point.

MR. MACALUSO: Judge, I don't mean to be repetitious. I **[316]** did not quite understand the last response and I just want to clarify it.

MR. WEST: Judge, we can have it read back.

THE COURT: I asked him and you can ask him one more time, Mr. Macaluso.

Q Just so we're clear, are you saying you can, sir, or you cannot?

A Yes, I can.

Q Okay. I am about out of time, Mr. Bozeman, but let me simply ask you: Do you have any questions of us at all at this time?

A No. No, I don't.

Q Sir, do you know of any reason whatsoever, whether I touched on it or not, why you feel you could not be a fair and impartial juror in this type of case?

A No.

Q Any reason that you know of, sir, why you could not sit in judgment of a fellow human being?

A No.

Q Okay. Anything that the Judge **[317]** covered with you the other day that you have any questions about, in any procedure that is involved in the trial of a case such as this?

A No.

Q Any problems at work or anything like that, family schedule?

A No.

Q You're a happy single man, aren't you?

A Yes.

Q You've been very polite and very kind and open and honest with us, Mr. Bozeman, and I appreciate it. That's all the questions I have for you, sir. I know that Mr. Cunningham and Mr. West will have some questions for you at this time. Thank you, very much, sir.

MR. MACALUSO: I'll pass at this time, Your Honor.

THE COURT: Thank you, Mr. Macaluso.

[318] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Bozeman, as the Judge and Mr. Macaluso indicated to you, my name is Brice Cunningham and, along with Mr. West to my immediate left, we represent Mr.' Miller-El in this case. I'd like to ask you just a few questions concerning your questionnaire.

How long have you been at the University of Texas at Dallas?

A I've been there about six months.

Q Where were you employed before that?

A Cam Audio.

Q How long were you with Cam Audio?

A I was with them a year.

Q Are you still attending college?

A No, I'm out right now.

Q That is at Denton, the University of Texas—no, North Texas State University? A Right.

Q Mr. Bozeman, you indicated that you read the Dallas Times Herald; is that correct?

A Yes.

[319] Q Every day?

A Yes.

Q Have you read anything that may purport to be what the facts are in this particular case in the Dallas Times Herald?

A No, I haven't.

Q If you did, you would know that you would have to put that out of your mind, if chosen as a juror on this case, and disregard that because that is some hearsay that reporters are putting in the paper. All the evidence will come from where you're seated there now and in the physical evidence?

A Yes.

Q You could do that if chosen as a juror, sir?

A Yes.

Q The same thing would apply to radio or TV?

A Right.

Q You answered yes to a question that, either you, your spouse or any member of your family or a close friend ever studied law. Who was that, sir?

A I have a cousin in Los Angeles who **[320]** works for the DA's office.

Q Do you communicate with your cousin in Los Angeles?

A No. I haven't for a few years.

Q Does he try criminal cases or civil cases or do you know?

A I think she's a criminal—

Q Oh, it's a she. Sorry. What is her name?

A Joleen Harkess.

Q When is the last time you saw her?

A Oh, it's been about six or seven years at a family reunion in Longview.

Q And the person that studied sociology is that you?

A Yes.

Q You also answered that you were interested in the outcome of a criminal case in Dallas County. You said yes, talking about T. Cullen Davis. That was just a passing interest as most people were at the time; is that true, sir?

A Yes.

Q And whatever you may have read or heard, either on the TV or the radio or in the **[321]** papers, you could put that out of your mind and, if you're chosen as a juror on this case, base your decisions totally about the facts and evidence that you hear?

A Yes.

MR. CUNNINGHAM: Pass the juror.

THE COURT: Mr. Bozeman, let me ask you, if you would, sir, to go either in the jury room or the hall. Why don't you wait out in the hallway while we take up a law matter and we'll get you back in just as quickly as we can, one way or the other.

(Whereupon, Mr. Bozeman, left the courtroom, after which the following proceedings were held.)

THE COURT: I thought it might be better to remove the juror in case there's any discussion about what the State did and what the defense did. Mr. Macaluso, the juror has been **[322]** qualified.

MR. MACALUSO: Yes, sir. We'll exercise a preemptory challenge at this time, Your Honor.

MR. CUNNINGHAM: I want to ask him one other question, Your Honor.

THE COURT: Ask Mr. Bozeman?

MR. CUNNINGHAM: Yes, or the Court can. I just want to put it in the record his race.

THE COURT: The Court will take note of the fact that he is a black male and, according to the juror's sheet, he's twenty—eight years old.

In view of that, Mr. Macaluso, is the State exercising this preemptory for racial reasons or some other reason?

MR. MACALUSO: May the record also reflect that this is the first black that has been questioned by the State and the **[323]** defense.

THE COURT: Mr. Macaluso, I don't think the law requires the State to state its reason, but I think it is appropriate to ask you if it is for reasons other than his race.

MR. MACALUSO: No. I would state without hesitation or reservation that it is not, Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory challenge in this particular situation because of the general answers of the venireman, Mr. Bozeman, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able **[324]** to override his personal feelings with regard to somebody receiving a life sentence, and that he also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

THE COURT: Let's bring Mr. Bozeman back in, please.

(Whereupon, Mr. Bozeman was returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Bozeman, come on back in, please, sir, if you would. Mr. Bozeman, you have been excused from service in .this case, but I want to thank you and the lawyers want me to thank you for your attendance and your patience in answering these questions. You've very conscientiously answered the **[325]** questions and I hope you have good luck in your college career. I hope you get to finish college. It looks like you're working at it. Good luck to you.

(Whereupon, Mr. Bozeman left the courtroom, after which the following proceedings were held.)

MR. NELSON: Judge, during the last voir dire by Mr. Macaluso, Mr. West made an objection with reference to things being redundant or repetitious during voir dire. The Court has placed a time limit on us and it is our feeling, that as long as we work within that time limit, we can ask things as many times as we want to ask them. I don't think it is a proper objection and we would ask that the defense be instructed not to make that objection again in the presence of a juror.

* * * *

[397] BILLY JEAN FIELDS,

called as a jury panel member, having been dull sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Fields. Let me begin by reintroducing everyone here so you're acquainted with everyone here at the table. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Hello.

Q Along with Mr. Norman Kinne, who is seated right over here to your far right, as he was introduced yesterday. We are three assistant criminal district attorneys here in Dallas, Mr. Fields. We work for the district attorney, Henry Wade. We've been designated as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Fields?

[398] Q And to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Fields, how are you doing, sir?

Q Both Mr. West and Mr. Cunningham, you may recall, were introduced to you yesterday—not yesterday, Monday I guess it was. I lose track of time. They're the defense attorneys who have been appointed by Judge McDowell to represent the accused Defendant. His name is Thomas Joe Miller-El. Let me ask you if you can see from where you are—you may have to lean forward a little bit. He's in the powder blue suit down there. Can you see him?

A Yes.

Q The reason why I've reintroduced you to everyone here is to let you hear our names once again and to reacquaint you with the roles that we all play in this case and then simply to ask you if you either know or have heard of any one of us other than from the other day when we were introduced?

A Well, since I was here Monday, I heard about the case on the radio.

[399] Q Okay. Could you tell us a little bit about it? What did you hear?

A Well, just a spot announcement that the case was fixing to be heard and it would probably take three weeks to seat the jurors.

Q What radio station was that, if you recall?

A KRLD.

Q Did they go into anything that was purported to be the facts or did they maintain the facts of the offense?

A It was just an announcement.

Q Did they give any information at all over the radio about where it happened or allegedly happened or who was involved? Let me ask you this, sir: Was there anything that you heard on the radio or anywhere else, if you've read anything, for that matter, or talked to anybody, that you feel would influence your decision in this case or keep you from being a fair and impartial juror?

A No.

Q Okay. You could put that aside, whatever you heard?

[400] A Correct.

Q Okay. And even if you couldn't, it wouldn't affect your deliberations; is that correct?

A No.

Q Okay. Mr. Fields, as you well know at this point, you are a prospective juror in this type of case. The law allows us to talk to you individually like we're doing now instead of talking to you in front of all the other people. I believe you've been on a civil case before; haven't you?

A Yes.

Q Did the lawyers talk to you individually during that jury selection?

A No.

Q Typically they will talk to you and you have to answer questions, but you have to do it in the presence of all the other jurors. We've got a little bit of privacy here today and that's the way it is in a death penalty case because we want you to be as relaxed and feel as free to express yourself as you possibly can without having a bunch of—you know, forty or fifty other strangers **[401]** critiqueing everything you have to say about some personal things. Let's take advantage of that, if we can. You look like you're pretty relaxed, anyway, but if you aren't, I'd invite you to be.

A I'm relaxed.

Q Sure. Remember that there are no right or wrong answers, sir. No one is going to quiz you about this. No one is grade you on your answers. We just want to know how you feel and, in some instances, how you feel about certain things. Okay?

A Yes.

Q And if you're just honest with us and tell us how you honestly feel and, if we ask the right questions, then we'll be doing our job and so will you. No one is going to talk you into anything or talk you out of it or try to. I'll guarantee you that. No one is going to argue with you, quarrel with you, pick at you, criticize you or anything like that. We want to know just honestly how you feel, seat of the pants. If you have a question at any time, whether it is while I'm talking to you or the other lawyers are talking to you, by **[402]** all means ask the question or make the statement if it's something you need to tell us that we haven't covered, okay?

A Yes.

Q Now, let me tell you what the State's position is in this particular case. You know that the Defendant is charged with capital murder, the most serious level of offense under the laws of this state. You know that a person who is convicted of capital murder can receive only one of two possible penalties. One is a sentence of death and the other is a sentence of life. There is no in between. It's one or the other.

Now, let me tell you what our position is, that is the position of the lawyers for the State of Texas in this particular case. Mr. Fields, we are actively seeking the death penalty in this particular case for Thomas Joe Miller-El. The only reason I tell you that is, is to be fair to you and put you on notice right from the very beginning as to what our posture is and what our position is. That is, we intend to be able to provide a jury, once it's selected—and we only have **[403]** one juror so far—with both the type and the quality of evidence so to convince them beyond any reasonable doubt

whatsoever that Mr. Miller-El is guilty exactly as he is charged in this indictment and nothing less.

In the second part of the trial, in the penalty phase of the trial, once again, we intend to provide a jury—that would mean you, of course, if you are on it—with the type and the quality of evidence that would convince them beyond a reasonable doubt that the questions should be answered yes in each instance which, as you know, as the Judge told you the other day, would result in the Judge sentencing the Defendant to be executed. Am I making myself clear?

A Yes.

Q Now, that is our position. Our position really doesn't matter because, of course, ultimately it's the position of the jury and ultimately based on the evidence. I want you to know what we're seeking and we're going about it, okay?

A Yes.

Q Now, do you have any questions to **[404]** this point, sir?

A No.

Q Okay. Good. With those preliminary remarks out of the way, let me just ask you, Mr. Fields, although you did indicate here on question fifty-six with regard to do you believe in the death penalty—they don't give you a whole lot of room and you don't have a lot of time to think about it or to respond, but would you just tell us, sir, in your own words, just how you feel about the death penalty and capital punishment and your ability to actually serve on a jury of this type and actually render a decision that could result in the death of the Defendant in this particular case?

A Well, I also indicated on there that I was active in a church and, according to the way I personally believe, which may not necessarily be according to my denominational stance, God's word, you know, provides for the State to serve in his behalf. According to the Old Testament, people were killed if they violated His law. In its extended service,

the State represents Him if the crime has been **[405]** committed and death is warranted.

MR. CUNNINGHAM: I'm sorry. I didn't get the last part.

A I said I feel that the State is God's extended person. In other words, the State represents God in today's time.

Therefore, if the State exacts death, then that's what it should be.

Q You said there was some conflict possibly between—you said what the church believes, what your religious beliefs are—

A Well, I said me personally. There are people who are Catholic, Baptist and whatever else, that don't believe in the death penalty. They don't think it's God's will that people should be executed. They think He's a very loving God and He's not one that punishes. I don't believe that way.

Q So you have no philosophical reservations about the death penalty or any religious reservations?

A No.

Q Mr. Fields, do you feel that it serves a particular purpose?

A Does it serve a particular **[406]** purpose?

Q Do you think the death penalty or the imposition of the death penalty; do you think that serves a purpose?

A Yes.

Q How do you view that?

A Well, I think that, if an individual knows that there is the possibility of death awaiting him or her, maybe they will think twice before they decide to premeditate—

Q In other words, you feel—I'm sorry. I didn't mean to cut you off.

A I just said that they would think twice about what they're going to do.

Q In other words, you feel it may well be a deterrent to other people, to deter them possibly from committing that type of offense?

A Yes.

Q Have you ever felt differently about the death penalty?

A No.

Q You're forty—six. Are you folks alive?

[407] A Yes.

Q Do you know or could you hazard a guess what their position would have been about the death penalty?

A No, I don't know.

Q You're married to Mrs. Fields. Would you know or could you hazard a guess about—

A She feels basically the same way I do.

Q All right. Let me ask you: What sort of offenses do you feel, personally—just picking your own brain and just searching your own soul, what sort of offenses do you feel the death penalty ought to be reserved for?

A Well, the taking of a life, basically—

Q Do you feel strongly about that?

A —but then—well, yes. Now, of course, there are other crimes that fall in the same category and that would be rape and the misuse of an individual by another for his own personal gain where this individual's basic freedoms were hampered.

[408] Q You said it should be reserved, in your opinion, for murder type offenses?

A Murder, rape and slavery, I suppose you could say it that way, if a person's civil rights are being forced out of play.

Q Anything else you can think of?

A Not particularly.

Q The law largely agrees with you in that respect with the exception of the last aspect that you mentioned.

The death penalty in Texas, at least, is reserved for murder—type offenses. You mentioned rape. There is one aspect of that that comes into play, a murder offense is made a capital offense. I'll talk to you about that in just a minute. Under the laws of Texas, the only offense for which you can receive the death penalty for, even potentially, is for what we call, as you know, capital murder. First you have the offense of murder. That's just called murder. That's a first degree felony under the laws of this state.

A person commits murder if he knowingly or intentionally causes the death of **[409]** another human being. That's basically what it is, just murder, and you can't receive the death penalty for it. Am I making myself clear?

A Yes.

Q On the other hand, if you commit murder of a certain class of individual or murder under certain circumstances, the murder itself becomes raised or elevated to a level of capital murder. You can receive the death penalty for capital murder. Do you see what I'm getting at?

A Yes.

Q An example of that is, if you commit murder during a rape or murder during a robbery, murder while you're committing a burglary or arson or kidnapping—do you see—murder plus. Or obviously, as I'm sure you well know, if you murder a police officer or a fireman or a jail guard in the lawful discharge of their duties, then you can receive the potential punishment of the death penalty. If you kill—multiple murders, you know, a string of murders in one situation, or if you hire yourself out. There are other areas, but **[410]** basically, it's either class of individual or murder during a particular situation. How does that square with your way of thinking of what death penalty case ought to be, you know, given the individual facts and circumstances?

A Okay.

Q As I mentioned earlier in my initial question, do you have any reservations at all about your ability to actually sit on this type of a jury and render a decision, actually make

the decision that could result in the execution .of another human being?

A No.

Q Could you do that?

A Yes.

Q All right. Now, let's talk a little bit about the way that the determination is made. In other words, the Judge talked to you on Monday and told you basically how a criminal trial is conducted here in this state. The trial itself is conducted in two parts. Let me pause a second. Have you ever been down here on jury duty, other than on the civil case?

A No.

[411] Q Well, criminal trials, all criminal trials, whether it be for the lowest misdemeanor or for a capital offense, they're all conducted in two phases or two distinct parts. We call them two separate trials. The first part deals only with the guilty or innocence of the person who is charged. That's all. The only determination the jury makes is, the person is guilty beyond a reasonable doubt. In other words, has the State proven that he is guilty, proved all that is in this indictment beyond a reasonable doubt, or have they failed to do so. Before you could actually serve on a jury, whether it be a capital case or otherwise, you take a sworn oath to a true verdict render according to the law and according to the evidence. It boils down to this, if the State proves that the man is guilty, we've proved all the elements of the offense to you beyond a reasonable doubt, your oath requires that you find the Defendant guilty. Just the same, if we fail to prove all the elements in the indictment, then the jury will be required to find the Defendant not guilty. Any problem with that at all?

[412] A No.

Q If we prove it to you, you could be able to find a Defendant guilty, could you not?

A Yes.

Q If we didn't, you would find him not guilty?

A Right.

Q Okay. If you find him not guilty, the trial is over. If you find him guilty, then we go on to the second part of the trial where the actual punishment is now a consideration. Do you see how they compartmentalize that?

A Yes.

Q Okay. In the second part of the trial,you can hear additional evidence to aid you in making the decision you would be called upon to make. Then again, there is no requirement on either side to offer additional testimony. You see, either side can offer testimony, but neither side has to. Am I making myself clear?

A Right.

Q If you didn't hear any more **[413]** testimony in the second part of the trial, then you would be called upon to make a decision as to the punishment on the basis of all you learned in the first part of the trial. While the trial is in two parts, you see, in the second part of the trial, you can consider all the evidence you heard up to that point, even in the first part. Do you see what I'm getting at?

A Yes.

Q In other words, you're not limited to what you hear in each section. Now, whether you hear additional testimony or not, at the end of the second phase of the trial, it used to be that juries made a decision direct in a capital case whether a person should live or die or receive a number of years. In other words, if you had a particular feeling about it and after you heard the evidence, you thought the person ought to die and the other eleven people agreed, that's how you voted and that's what it was. If you thought it should have been life and everyone agreed with you, everyone on the jury unanimously agreed, then it's life or some number of years, but you made **[414]** the decision on a personal basis. You decided personally how the evidence affected you and what you wanted to vote for.

That changed about thirteen years ago and that particular prerogative has been taken away from the jury. Instead of holding the life or death or a number of years on the basis of your personal feelings, instead you're called upon to answer these three questions. It's on the basis of the answers to the three questions that the law requires the Judge automatically to assess a penalty of death or a sentence of life. Am I making myself clear?

A Yes.

Q Now, you know as well as I do at this point that all the answers that are submitted, you—can receive no more than three—and I'm going to let you look at them in just a second. If all the questions are answered yes, then the law requires and would require—and there's no doubt in mind that Judge McDowell would follow his oath, as a Judge of the courts—the Judge to sentence the Defendant to be executed. He can't override your verdict. He may not necessarily **[415]** agree with your verdict, but you wouldn't know that. He cannot say, "Well, you answered these questions yes, but I think he should get a life sentence." or "I'm going to give him a life sentence instead of the death sentence." He can't do that. If you answer all three questions yes, the Judge will sentence the Defendant to be executed. It's just the same, if you answer one or more of the questions no, you see, whether he agrees with you or disagrees with you, it doesn't matter. He will assess a sentence of life. Am I making myself clear?

A Yes.

Q All right. Now, you know that the State—has the burden of proof in both parts of the trial. We brought the indictment. We've done the accusing and we must also do the proving. The same thing holds true for the second part of the trial. We're seeking the death penalty. We must provide you and the other jurors with the type and quality of evidence that convinces you that the questions should be answered yes. If we do, then you answer the questions yes. If we don't, you **[416]** answer the questions no. Any problem with that at all?

A No, sir.

Q Okay. Let's take a look over here on the left. There's a number one, a number two and a number three. Take your time and read those, sir, if you would, please, and we'll talk about them in just a second.

A (Juror complies.)

Q Have you had a chance to look at those?

A Yes.

Q Did they cause you any problem right off the bat, any confusion?

A No.

Q All right. You understand that you would only be called upon to answer these questions, Mr. Fields, assuming—let's just set a hypothetical example here. Let's say you're on a capital murder case and you've heard all of the evidence in the first part of the trial and you and the other jurors agree that the Defendant is guilty. Let's just assume that imaginary case, okay? You've heard all the evidence in the second part of the **[417]** trial or you've concluded the second part of the trial, whether there was any additional evidence or not. You're back in the jury room and you're called upon to answer these questions. Now, the first question asks, was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result. What do you think you're being asked there, Mr. Fields?

A Oh, it's asking—wanting to know if the person who committed the crime did it deliberately, with the premeditated intent to kill.

Q Okay. In other words, you look to the conduct of the individual. I think you can see that probably—you're seeing the information that you need to answer this question probably when you're learning about the offense itself, how it all happened, what role the Defendant played, and so forth and so on. You decide whether he acted deliberately, was whatever he did, whatever role he played, did he act deliberately. Some people say **[418]** intentional, but was it deliberate conduct. Did he intend to do it and did he act deliberately. Furthermore, was the act or whatever he did, shooting somebody, knifing somebody, whatever it may have been—and I'm not talking about this case, you understand. I'm just talking about an example, a hypothetical example—was that done with the reasonable expectation that someone was going to die. Can you see how you can answer that question yes or no depending on the facts of the case?

A Yes.

Q Let's go on to number two. What do you think is being asked there, is there a probability that the Defendant will commit criminal acts of violence that would constitute a continuing threat to society?

A Well, this is asking, I think, would the person be classified as a professional criminal or was this just an isolated incident that resulted in the death.

Q What do you think would be the most valuable evidence that you could receive? In other words, if you could say to us, "Mr. **[419]** Macaluso, this is what I consider the most important. I would like to know this about the individual or know that about the individual", if you wanted to answer that question yes? What can you tell us in that regard? What do you think would be the most valuable thing for you, Mr. Fields, to know about somebody that would enable you to answer that question yes?

A Well, if the individual at the time the crime was committed—if there were individuals who saw what took place or whatever, some type of, you know—an individual or a film or whatever that indicated the person did the crime.

Q Let's just assume that you—understand that you've already found the individual guilty of the offense. Now, you're deciding whether or not there's a probability he would commit future acts of criminal violence. What sort of evidence do you think would aid you, what sort of testimony, what sort of facts, what sort of background, in deciding

whether or not this is the type of individual that would probably do something of a criminal nature again?

[420] A Well, typically you would say a history of the person's past actions, but I would think also possibly hearing that individual himself talk to me.

Q Well, you understand—let me just back up a second. You understand that in a criminal trial, no matter what kind of criminal trial, be it capital murder or shoplifting, any person charged with a crime has a right not to testify?

A Yes.

Q Although I have no way of knowing, in any case, whether a Defendant will testify or not, let's assume that the Defendant does not for these purposes. Do you understand that, if the Defendant wants to testify, he can and, if he doesn't want to, no one can make him? Do you understand that, also?

A Yes.

Q If he chooses not to testify, that's fine. That's a right that we all have. You cannot consider that as any evidence of his guilty whatsoever. Do you understand that?

A Right.

Q You can't hold that against him in **[421]** either part of the trial?

A Right.

Q So it may well be, during the trial, that you may not hear from the Defendant, do you understand that, so wouldn't have that information to assist you. Let me ask you this, Mr. Fields; Do you think you could learn enough about an individual when you learn about the crime itself for which he's on trial, when you learn the dynamics of the crime, the very spastics of the crime? In other words, what lead up to the crime, what planning was involved, what role did a Defendant had in that planning, if any, what alternatives he could have taken, did he have to commit this crime. I mean, was it necessary or, you know, any stretch of the imagination, doing the commission of the offense itself? Did he have

to do this? Did he have to do that? How violent and vicious was it? What role did he play in it? Was he subservient or was he. active in calling the shots, so to speak? Do you see what I'm getting at?

A Yes.

[422] Q What alternatives did he have? What about afterwards, how did he react? Did he show remorse and contrition or was he nonchalant, was he blase, did he care, you know, was it another day at the office, was he the type of person that it was just like swatting a fly? Do you see what I'm getting at?

A Yes.

Q Do you think you could learn enough about an individual when you learn all of those facets of his involvement in a very serious capital murder to tell you to answer that question, yes, there's a probability he would commit some criminal acts of violence in the future? Do you think you could do that?

A Right.

Q I'm not trying to—I just want to know how you feel about it. Don't go along with me. If you don't think so, fine. Do you think you could?

A Yes.

Q You said, also, that you would like to know about his background?

A Right.

[423] Q All right. Other criminal acts and so forth?

A Yes.

Q Let me just ask you briefly: What does that word probability mean to you in that connotation?

A Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.

Q Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A No.

Q You think everyone can be rehabilitated?

A Yes.

Q I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

[424] A Well, I think you're talking about the fact of whether or not it was premeditated. It may be farfetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. I know the State has a program that is supposed to work, but also it has a relatively bad record. I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

Q Let me ask you this, sir—and I don't mean to quarrel with you. I want you to understand that. These questions are very important to all of us and your impressions of these questions. As I said earlier, you're not saying anything right and you're not saying anything wrong. You're just being honest with us. You notice that there is nothing in these questions that directly verbatim addresses rehabilitation. The word is not used there. **[425]** Of course, I can't tell you what these questions mean. Do you understand that? That's for you to decide. Let me ask you this hypothetically: Do you feel that if somebody, as you just said earlier, if the Defendant—and we're not talking about Mr. Miller-F. We're just talking about an imaginary Defendant—were to get on the witness stand and indicate to you that he is repentant and has had this religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes regardless of the evidence at that point? Could you ever allow this person to ever be executed?

A Yes.

Q I'm just curious. How would that square with your feelings about rehabilitation?

A Well, now based on what you said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the **[426]** jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down.

Q Let's shift gears away from capital murder and let's talk about a situation that I'm not suggesting occurred in this particular case, but it something I have to approach with you at this point because we have the opportunity. Let's imagine again that you're on a jury, a capital murder case. Let's say it's a murder alleged to have been committed during a rape. That's a type of capital murder. Let's say you were convinced, along with the other jurors and you don't have any doubt whatsoever that the Defendant committed the murder, but let's say you don't hear any testimony about any rape or you have a reasonable doubt that it occurred during the commission of a rape, you understand that if we expect you to convict somebody of capital murder, we have to prove both the murder and the rape. Am I making myself clear?

A Yes.

[427] Q We haven't done that, have we?

A No.

Q Not in that example. What you do in a situation like that, you have to, under your oath, find that Defendant not guilty of capital murder simply because we didn't prove capital murder. Do you see? What did we prove?

A You proved rape.

Q No, we didn't prove rape at all. We proved murder.

A Well, one or the other.

Q Right. There's no testimony on rape, but there is testimony on murder and you're convinced it was a murder, so you find him guilty of murder. It wouldn't be capital murder and if it's not capital murder, it's not mandatory life or death. Do you see what I'm getting at?

A Yes.

Q In that situation, you would be called upon to assess a penalty for the offense of murder, not capital murder, but just regular murder and you can't receive the death penalty for regular murder. Now, so we're clear on **[428]** this and I want to be brief about this, but I need to cover this with you. When we talk about murder, we're talking about a situation where one person knowingly or intentionally or both, knowingly and intentionally, causes the death of another individual without any legal excuse and without any legal justification at all. So when you talk about murder, I want to divorce from your mind, if we can, a homicide, you see, where you have somebody who was acting in self-defense. In other words, when you talk about the range of punishment for murder, we're not talking about a range of penalty for a situation where you believe someone killed somebody else, but they did it in self-defense because, if you believe that someone acted in self-defense—for example, if I felt that Mr. Nelson was going to kill me or you felt that way about me, you have the right to protect yourself all the way to the point of using deadly force to kill me. See, you could be charged with murder or I could be charged with murder, but if the jury believed that I acted in self-defense, they would have to find me not guilty. Do you see what I'm getting at?

[429] A Yes.

Q It's not like you're giving a lower penalty. Huh-uh. You have to find the Defendant not guilty. Do you see what I'm getting at?

A Yes.

Q So when we're talking about murder, forget about someone that kills in self-defense. All right? The same thing holds true if you believe it was an accident. It may look like murder and somebody could be charged with murder, but if you believed honestly or had a reasonable doubt that it was an accident, the gun went off accidentally or something like that, you don't give them a low punishment. You find them not guilty. So don't be thinking about accidents, either, all right, or 'insanity. A lot of people are skeptical about insanity defenses these days for whatever reasons, but if you believed someone was insane at the time he killed somebody, you would have to find them not guilty, so don't be thinking about that. The same thing holds true if you believe it was a crime of passion. That's a situation—as an example, if someone comes **[430]** home and finds out that their child has been sexually molested by a neighbor and the neighbor is up the street laughing about it and you go into a rage basically, adequate cause, you take a gun and you kill the neighbor. The law doesn't excuse that, but it doesn't make it murder, either. If you were on a jury and you believed that the person killed with that kind of sudden passion, that sort of influence, you would not convict him of murder. You would convict him of voluntary manslaughter, so that's not murder. Do you see what I'm getting at?

A Yes.

Q The reason I'm making that point is, I want to make sure you understand as clear as I can present it what murder is. Now, the penalty range for murder is as broad as it is for any offense under the laws of this state. Okay. Let me ask you—I know you said earlier that you felt obviously strong about murder being, obviously, a very serious offense.

THE COURT: One moment, please. Is this a juror?

[431] MR. MACALUSO: Thank you, sir.

Q Mr. Fields, if you had the power, what do you think the minimum penalty ought to be for a murder as I've described it? In other words, I can't give you facts and situations like this type of murder or that type of murder, but ex-

cluding those things that we did discuss, excluding self defense, excluding insanity, excluding accident, excluding any crime of passion or an emotional type thing.

A Are you saying that all of those you just named and described earlier—say types of violence that have a premeditated reason; is that what you're saying—

Q No.

A —and murder without a premeditated reason—

Q No. What I'm saying is, if one person knowingly or intentionally kills another and there is no legal excuse or justification. Those four things I gave you are legal excuses or justification. You see?

A Okay.

Q In other words, a person knowingly **[432]** or intentionally kills another person and it wasn't in self-defense because that's not murder and it wasn't insanity and it wasn't an accident and it wasn't a crime of passion.

A Well, based on what I told you earlier, death would be the result.

Q All right. Now, that's your personal feeling, is that correct?

A Yes.

Q Now, let me explain, but it's not to argue with you or quarrel with I'm not going to do that. The range of under the laws of Texas for the offense of murder is not less than five years nor more than 99 years or life, depending upon the facts of a murder case, but still bear in mind excluding those four things I described to you. I'm not talking about any of those. I gather from what you're saying—or just tell me in your own words, could you ever, would you ever, think, sir, that a five year sentence would ever be proper under any facts and circumstances for the offense of murder where one person knowingly or intentionally causes the death of another person, no self- **[433]** defense, no accident, no insanity, no crime of passion?

A Now, you asked me could I—you want to know what do I think the minimum penalty would be in a case of murder?

Q Right. What I actually want to know is, would you ever, knowing yourself, feel that five years would be enough, that the minimum punishment, five years—could you ever assess a penalty for five years in a murder case regardless of the facts or circumstances? As long as there is a murder, could you ever give as low as five years?

MR. CUNNINGHAM: And he felt that was the proper punishment based upon the law and the evidence that he had heard, Your Honor.

A Are you meaning personally or based on how the law sets this out?

Q Well, I guess a combination of both.

A Well, I was asking him, was he meaning how did I

feel about it personally or how did I feel about it in regards to how the **[434]** law says it is.

Q Well, the law sets out—you see, we want to know how you feel.

A Well, it would be fine.

Q You say you could give five years?

A I'm saying I could give five years.

Q And if you felt it was proper, if the facts and circumstances called for ninety-nine years or life?

A I could give that.

Q Let me ask you this, sir: Do you know of any reason why you couldn't sit in judgment of another human being in a case of this type?

A No, sir.

Q The law says that a conviction can be had—that is, the jury can base a conviction on the testimony of one eyewitness to a crime. That's what the law says. You can understand how frequently there may be only one eyewitness to a crime, a lady is raped or someone has had their purse taken

from them, whatever the case may be. There may be one survivor to whatever offense it is. The law **[435]** says that, whether it be capital murder or shoplifting or rape or purse snatching, if the jury believes that one eyewitness beyond a reasonable doubt—in other words, they believe that person can recognize the individual and testify to all the elements of the indictment, the jury can base a conviction on that and nothing else. How do you personally feel about it? Could you base a conviction in a capital murder where the death penalty is a potential on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A Yes.

Q I'm just going through the questionnaire here. You said your brother it says, "Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense?" and you said something about your brother?

A Right.

Q Could you tell me a little bit about that?

A He was arrested and convicted on **[436]** number of occasions for possession of a controlled substance.

Q Was that here in Dallas?

A Yes.

Q Was he involved in any trials or anything like that?

A I suppose of sorts. I don't really know too much about it.

Q Was he ever convicted?

A Yeah, he served time.

Q Do you feel that that would in any way interfere with your service on this jury at all?

A No.

Q Mr. Fields, you've been very polite and very kind and very open with us and I appreciate that. Let me just ask you, sir, whether I touched on it or not, is there any reason that you know of why you could not—be fair and impartial to both sides?

A No.

Q Do you have any questions of me at all?

A No.

MR. MACALUSO: Thank you **[437]** very much. Your Honor, I'll pass the juror. Mr. Fields, Mr. Cunningham and Mr. West will have some questions for you.

THE COURT: Go ahead, Mr. Cunningham.

[438] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Fields, as you have been advised, Mr. West and myself represent Thomas Joe Miller-El in this case where he is charged with the offense of capital murder. Very briefly I'd like to ask you some questions with reference to the questionnaire and possibly concerning some of the law.

First of all, what age man are you, sir?

A As of yesterday, I'm forty-seven.

Q Happy belated birthday. How long have you lived in Dallas County?

A About twenty-five years, twenty-four years. I came here in '62.

Q What is your race?

A I'm really colored.

Q Okay. Are you married, single or what is your marital status?

A I'm married and I have four children.

Q Does your wife work?

A No, she doesn't.

Q Where do you work?

[439] A I work for the U.S. Postal Service.

Q That's here in Dallas?

A Yes.

Q How long have you worked for the postal service?

A Eighteen years.

Q Do you have any children?

A Yes, four.

Q What do they do?

A They're all students from a senior in high school down to the third grade.

Q You attend St. Monica Catholic Church?

A Yes.

Q Is that an integrated church?

A Yes.

Q What racial mixture would you say it was? You know, how many—

A Oh, I would say the majority there are white or caucasian and then the next majority would be Latin American or Mexican American and then your people from the far east or middle east Indian, Vietnamese.

Q In other words—your church is **[440]** located where, in North Dallas?

A It's at the corner of Walnut Hill Lane and Midway Road.

Q How long have you been a member of St. Monica Catholic Church?

A For ten years.

Q Do you teach Sunday school or hold an office or anything?

A Well, in the Catholic church you don't have Sunday school as it's set up in the protestant church. I'm a member of the Holy Name Society and that's a men's organization and it's basically devised or set up to assist the pastor as he needs and to promote the belief of Christ.

Q How long have you been a member of the Holy Name Society?

A For the last seven years. Now, in conjunction with that, as far as teaching goes, not within that parish, but at large within the Catholic church, there is what we call the charismatic renewal and I have taught there.

Q How long have you taught in the charismatic movement within the Catholic church?

[441] A Eleven years.

Q I notice that you attend this church more than once a week?

A Well, between the movement and the church, yes, and meetings, and we have holy days of obligation which requires you to attend more than once a week.

Q You've indicated that you are a member or a financial supporter of a media church. What church is that, sir?

A St. Monica.

Q St. Monica?

A Oh, I'm sorry, the media church. Yes, sir. The 700 Club on—which is—

Q How long—have you been a contributor to the 700 Club?

A About five years.

Q You indicated that you have heard something on the radio, I believe—was it the radio?

A Yes.

Q You understand that that is not evidence in this case?

A Right.

Q And you could not consider that as **[442]** evidence?

A Right.

Q Well, like I said, yes, I can do it, but it didn't go into any detail. It just said that this was coming up and it would probably take three weeks to seat jurors and that's where the thing ended.

Q You also understand that, if you heard something—if you were chosen as a member of this jury and you heard something on the radio or saw something on TV or read it in the papers, you could not consider that as any evidence whatsoever?

A Right.

Q How long have you had the bumper sticker on the back of your car?

A Eleven years.

Q And that bumper sticker says what?

A It says, "Jesus Renews the Hearts of Men"—or "Jesus Renews Hearts" in big letters and then "(the Hearts of Men)" in parentheses.

Q You indicated that you had received a ticket once and you felt that it **[443]** wasn't deserved?

A Right.

Q The fact that you received this ticket would not affect your decision if chosen as a juror in this case, sir?

A No.

Q You indicated that either a friend or—member of your immediate family or a closer friend was a victim of a crime. Is that "mugging"?

A Yes.

Q Was it someone in your family?

A No, a friend.

Q Was anyone ever caught or anything?

A It just recently happened, so no one has been caught.

Q The fact that you have a friend that was mugged would not affect your decision, if you're chosen as a juror, in this case?

A No.

Q You would be fair to both sides?

A Yes.

Q Mr. Macaluso asked you about your brother. Whatever happened to your brother, **[444]** that would not affect your decision, if chosen as a juror, in this case, sir?

A No.

Q If you were chosen as a juror in this case, would you base your decisions only upon the evidence that you heard and the facts of that case, sir?

A Yes.

Q Let the chips fall where they may?

A Yes.

Q Do you know of any other reason why you could not be a fair and impartial juror, sir?

A No.

Q I'm going to add one word onto that. Do you know of any other reason why you could not be a fair and impartial juror other than your race, negro or color black?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. NELSON: Judge, may we approach the bench?

THE COURT: Surely. Mr. Fields, let me ask you to go out **[445]** in the hallway while we have a law matter to take up here and, in that way, we can just do it without the lawyers having to come around.

(Whereupon, Mr. Fields left the courtroom, after which the following proceedings were held.)

MR. NELSON: We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror.

THE COURT: Well, I can go into—go ahead, Mr. Cunningham.

MR. CUNNINGHAM: Your Honor, we would object. Mr. Macaluso talked with this prospective juror thirty minutes or more. I think one of his questions was whether **[446]** or not there was any reason why he could not be a fair and impartial juror. I asked him the same thing. If he thought that his coming vacation would affect his sitting as a juror, the State could have inquired. If he had thought—and I would suggest from the answers we have received from Mr.

Fields—it would affect his decision as a juror, he would have told us.

THE COURT: The only concern the Court has is, if he is accepted—I don't know what is going to happen, obviously. I would need to ask him, frankly, before I swore him, if there was any reason why he couldn't come back and serve in a month, say. I have had that happen.

MR. MACALUSO: I might add, Your Honor, that I have had this occur a number of times and I think we all have. I'm not trying **[447]** to play word games here, but I did overlook asking that question and I think the question, as Mr. Cunningham mentioned a moment ago, did address it, was there any reason why you couldn't be fair and impartial and not whether there is anything that would impede your service on this jury. I have had in the past and I know the Court is aware of situations that have occurred where we neglected to ask that question only to have it come up later on.

THE COURT: Well, Mr. Cunningham and Mr. West, how about the Court inquiring of him just in that area? I don't know where this information comes from.

MR. CUNNINGHAM: Your Honor, on behalf of the accused, Thomas Joe Miller-El, Jr., I would object to even the State, the defense, or the Court inquiring of the juror whether or not the fact that he **[448]** has a vacation coming up in one week, two weeks—and it looks like it's getting even longer in this case—and would suggest that under Article 35.11 that all the State can do now is decide whether or not it wants to accept or reject this juror.

THE COURT: Mr. Nelson, Mr. Macaluso, I agree with the defense on that. I probably would still like to inquire if he is accepted.

MR. CUNNINGHAM: And then he would have to make other arrangements. It's just that simple.

THE COURT: That would be my position, unfortunately. I'm going to hold the juror qualified at this point, Mr.

Macaluso and Mr. Nelson, and ask you—all to tell me whether you wish to accept or swear the juror?

MR. MACALUSO: We'll exercise—reluctantly exercise **[449]** a preemptory challenge, Your Honor. I want to ask the Court, does the Court intend to make an inquiry?

THE COURT: Of him, or just in the future of all jurors?

MR. MACALUSO: Of him.

THE COURT: If you wish, I will, yes, just for information purposes.

MR. MACALUSO: I understand. I can envision a situation, because I've seen it before, where it comes back to haunt us somewhere down the line.

THE COURT: I had that happen in the last case you and I did and we spent about three hours on the juror and found out in the last five minutes that he had some—I think in the future what I will do, when I'm doing my little preamble there, is just tell the person—remind them again what the potential schedule of this case is and ask them if **[450]** there is any reason they would be unable to do that. If they indicate there would be, I'll let the lawyers start pursuing it.

MR. WEST: Before we bring the juror back in, may the record reflect that is the second black that's been called by the Court for voir dire purposes.

THE COURT: The record may so reflect. I might add—go ahead, Mr. Nelson.

MR. NELSON: Your Honor, with reference to that, the State would like to offer into the record the fact that we're certainly not exercising a preemptory strike on Mr. Fields because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he **[451]** later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case. Those are our reasons for exercising our preemptory strike at this time.

MR. CUNNINGHAM: Your Honor, we would object—we would say, the defense would say, that the reason just given by the State for their exercise of their second preemptory challenge is a farce and that this juror was explicit both on his questionnaire and in answer to Mr. Macaluso about in the proper case and under the proper facts and circumstances that he could and would give the death penalty. He also expressed the fact that he was a deeply religious man and that is shown by his questionnaire and by the **[452]** information I elucidated from him and that there is nothing wrong with the fact of a person believing that every individual can be rehabilitated and that in no way conflicts with his belief that in the proper case and under the proper facts and circumstances, he could render a verdict answering the three questions, that are required by 37.071, yes if the evidence showed that and, Your Honor, there is no conflict and there was no conflict and the State had an opportunity to go into as much detail as it wanted to develop whether or not there was a conflict and, after all the examination by the State, there was no conflict shown.

Your Honor, for the purposes of the record, we would also—we want to offer the questionnaire that was filled out by Mr. Fields as an exhibit in this case, both **[453]** the one that the State had and the one that the defense has.

THE COURT: Well, the Court has one, too. I'll admit it—I'll give the State a chance to object to it. I'm sorry. I'm being a little presumptuous.

MR. NELSON: Excuse me, Judge. It's just for record purposes?

THE COURT: Right. I'm assuming it's just for record purposes?

MR. CUNNINGHAM: Yes.

THE COURT: I would offer to either side—I was going to say, if you—all wanted to, for appellate purposes, let the record reflect some of his answers on the questionnaire having to do with whatever, the number of children, that you could offer the questionnaire because it was given under

oath. The juror was sworn prior to the time he filled [sic] this **[454]** out.

MR. MACALUSO: The Court is going to attach his own?

THE COURT: I'll attach my own or a copy of my own because you-all may have marked on your and mine is not marked on

MR. NELSON: With reference to that, Judge, we would call attention to the fact that Mr. Fields' brother has been convicted of a felony and --

MR. WEST: Your Honor --

MR. NELSON: Excuse me, Mr. West --

MR. WEST: Well, the Court asked for objections and I'm asking to make a legal objection.

THE COURT: We're just making the record now. I assume there is no objection to that:

MR. NELSON: No, not for record purposes.

MR. WEST: For purposes of the record, Mr. Bozeman's and Mr. **[455]** Fields' questionnaires?

THE COURT: Yes.

MR. MACALUSO: The Court is going to admit, for record purposes, Mr. Bozeman and Mr. Fields?

MR. WEST: And Mr. Fields.

MR. MACALUSO: I have no objection to that.

MR. WEST: Excuse me, Mr. Nelson—

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: I just wanted to make sure the record is clear that I said we would like to call attention to the fact that his brother has been convicted of a felony prior to this, also, which is another consideration to the State's decision.

MR. CUNNINGHAM: Your Honor, there is no evidence that he was convicted of a felony.

MR. NELSON: All right. He **[456]** says he's been convicted of an offense and did time. The record will speak for itself on that, also.

MR. CUNNINGHAM: I think that, if he had been convicted of a felony, then he would have been disqualified—

MR. NELSON: His brother. His brother.

MR. CUNNINGHAM: I'm talking about his brother. That's the one you said was convicted of a felony?

MR. NELSON: Right.

MR. CUNNINGHAM: If he was convicted of a felony of possession of a controlled substance, then he would not be qualified and he never would have gotten up here and have been on this jury.

MR. NELSON: His brother.

MR. CUNNINGHAM: I'm talking about his brother.

[457] MR. NELSON: The fact that his brother was convicted doesn't disqualify him, as a matter of law, Brice.

MR. CUNNINGHAM: Oh, okay. Excuse me.

THE COURT: Let's bring Mr. Fields back in.

(Whereupon, Mr. Fields returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Fields, just come back up here in front of the bench, sir, if you would. Sir, you've been excused from any service in this case and I want to tell you that we appreciate your attendance and your patience with us and your very candid answers to the questions. When you're excused, you can give your badge to the bailiff. A question came up in my mind, because of your job, that you might have some **[458]** vacation coming. Would that have interfered with your service in this case?

MR. FIELDS: I'm on vacation this week.

THE COURT: You're on vacation right now?

MR. FIELDS: We have jury duty time.

THE COURT: So you get credit. You don't get docked?

MR. FIELDS: No.

THE COURT: You don't get docked for serving on a jury and you still get your vacation?

MR. FIELDS: Right.

THE COURT: Off the record.

(Whereupon, there was an off-the-record discussion, after which the following proceedings were held.)

THE COURT: This is number ten. Mr. Riddle, first of all, I apologize to you for the delay. We've got people scheduled here

* * * *

[1519] JOE A. WARREN,

called as a Jury, panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Thank you, Your Honor; and good afternoon, Mr. Warren. Mr. Warren, let me begin by reintroducing everyone to you. I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q When the trial begins, we will be joined by Norman Kinne. Mr. Kinne, along with the rest of us here, are assistant criminal district attorneys here is Dallas. We work for Henry Wade who, I'm sure you know, is the district attorney for Dallas and Mr. Wade has designated us to represent the State of Texas. Mr. Kinne, to our surprise, contracted the Chicken Pox. He's about fifty years old, so we're kind of ribbing him about it. I guess it's not really funny that he came down with it because he's got the Chicken Pox and we'll probably join him in the next couple of weeks.

[1520] To Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAH: How are you, Mr. Warren?

MR. WARREN: Fine, sir.

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Warren, good afternoon.

Q You may recall that they are the defense attorneys who have been appointed by His Honor, Judge McDowell to represent the Defendant who is charged with capital murder. His name is Thomas Joe Miller-El. He's in the powder blue suit and you may be able to see him form where you're sitting. He's charged with capital murdér. The reason I've taken time to, reintroduce everyone here is to reacquaint you with the roles we play, who we are and what we do, and simply to ask you if you recognize any one of us, Mr. Warren, other than from the other day?

A No. I've probably seen each of you.

Q **[1521]** Going down the halls of something like that?

A Yes.

Q You don't know anything about this case, do you?

A Not that I can recall.

Q As you well know, Mr. Warren, you are a prospective juror in this case We have two jurors, but one is kind of iffy because they may have a medical problem. Basically we have two jurors, but we need ten more before we can start. We've talked to—you're the twenty-eighth person that has been assigned to service in this case and we only have two jurors; so you can see how laborious and time-consuming this is.

Now, the whole purpose of this process we're going through is to ultimately try to find the twelve people that both sides feel are best suited and best qualified for this type of very serious case. You know the Defendant is charged with capital murder. That's the most serious level of all crimes under the laws of this state it's obviously serious because of the nature of the offense.

[1522] It involves a capital murder. It's serious because of the two possible penalties. You may recall that the Judge told you that a person who is convicted of capital murder can receive only one of two possible penalties. One is a manda-mandatory sentence of death by lethal injection of a drug that would kill him or a sentence of life, okay, in the Texas Department of Corrections. One of the other and there's no in between.

Now, because of the very serious nature of what we're about here, the law allows us to talk to you individually. Ordinarily -- have you been down here for juy duty before?

A. Yes, I have.

Q. Did the lawyers talk to you?

A. Yes, they did.

Q. In front of everyone else, didn't they?

A. Yes, they did.

Q. That can be kind of inhibiting, you know, if -- we're going to be asking you some personal questions. You know, some of these questions we've asked you here are of a personal nature on the questionnaire. When **[1523]** you're expected to answer up in front of forty or fifty strangers, maybe you would be less inclined to be open and speak your

mind as you would in this semi-private atmosphere that we have here and maybe you'll be a little bit less nervous. I know I would probably be very nervous if I were up there being asked questions by a bunch of strangers. Let me invite you to relax as much as you can. You don't look too nervous to me.

Let me remind you that there are no wrong answers to any of the questions I'm going to be asking you. There are no right answers, either. You just tell us what is on your mind. If we ask the right questions and you're honest with us, which I'm sure you will be, you'll be doing your job and we'll be doing our job and this whole thing will get accomplished, okay?

A. Sure.

Q. Let me tell you also that no one is going to try to talk you into something or out of something. No one is going to argue with you, quarrel with you, criticize your opinions or anything else like that. Just tell **[1524]** us what's on your mind. Sir, if you have a question about anything, then by all mans ask it. If there is something that you wish to add or something you want to tell us, this is the time to do it because, you see, if you're on this jury, number one, we have to rely on what you say now to decide whether or not you're qualified and suited for this type of jury. Number two, we have to rely on what you tell us now because, if something occurs to you later and you want to ask a question, you can't do that.

Now, let me tell you what our position is in the particular case, Mr. Warren. The State of Texas in this particular case is actively seeking the death penalty for Thomas Joe Miller-El. In other words, we intend, once the trial begins, to provide a jury with the type and quality of evidence that would convince this jury -- and that would mean you, obviously, if you're on the jury -- beyond a reasonable doubt that Mr. Miller-El is guilty of capital murder exactly as he is charged in this document, the indictment. That's done in the first part of the trial.

In the second part of the trial, we intend to be able to prove the same jury with the type and the qualify of evidence that would require them to answer three questions yes. In other words, all yes answers, as you know, would require the Judge to assess a sentence of death for Mr. Miller-El. The reason I say that is, is to be straight forward with you and lay our cards on the table and tell you where we stand right from the outset, that we intend to actively seek the death penalty in this case for this man here in this courtroom. You understand that our position is just that. It's just our position I'm sure that other lawyers have a position that may be contrary to that -- or we could assume that. Ultimately, what really counts is what the jury decides on the evidence. Okay?

A. Sure.

Q. Now, Mr. Warren, you were asked this question here and I want to just let you speak a little bit yourself now, let you do some talking, and I'll shut up for awhile. Why don't you just tell us, if you would, in your own words, sir, how you feel generally about **[1526]** the death pen[illegible], capital punishment, and then, sir, your ability or your inability to actually serve on this type of case where the death penalty is a consideration?

A. My personal position on the death penalty, there are some cases where I would agree, you know, and there are others that I don't.

Q. For example, what sorts of cases do you feel the death penalty is warranted in, what sorts of things come to your mind?

A. Well, I suppose where maybe things happen that could have been avoided. Maybe some cases like that, I would agree.

Q. Where someone kind of gets caught up in something maybe?

A. Maybe, you know, if there was some other way out, then I would assume -- I would think maybe they could have done something different or something.

Q. Where someone had a choice to kill or not to kill; is that correct?

A. I would say he had a choice, yes.

Q. Right. He had a choice. His didn't have to do what he did, let's say, but **[1527]** he went ahead and killed anyway is that right?

A Yes.

Q I gather you feel very strongly about human life, I gather, in that regard?

A Sure.

Q We're talking about murder?

A Yes.

Q What sort of crimes, if you can think of any—and if you can't, that's fine, but just let me know. What sort of crimes do you feel it would not be warranted? You said some cases yes and some cases no. Are you saying, if he didn't have a choice, you don't think the death penalty is warranted?

A I would say in some cases, if you were—in selfdefense sometimes, then I would say no.

Q Let me talk a little bit about murder and capital murder. First off, you can only receiver the death penalty in Texas for the offense of capital murder. It's a very, very special type of murder. Years ago you could get the death

penalty for rape and you could get the death penalty for armed robbery and some other offenses, I think. But under the **[1528]** law that is in effect in Texas today, the only offense that can receive or potentially receive the death penalty for is a capital murder.

Capital murder starts off basically with what we know as the offense of murder. I'll call it regular murder even though the law doesn't agree with that. It just calls it murder. Murder is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or any legal justification. Murder, as I've described it, is not a capital offense. It is not an offense for which a person, under the laws of Texas, can receive the death penalty.

For example, if I knowingly and intentionally cause the death of Mr. Nelson without any legal excuse or justification, that may be murder. Unless it's committed under certain circumstances or Mr. Nelson is a particular class of individual like a fireman or a police officer, then all it is—I shouldn't say all it is because it's obviously very serious. It is not capital murder. Am I making myself clear?

[1529] A Yes

Q All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody, and you murder somebody who is a policeman or a fireman or jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A Yes.

Q Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when there were six or seven people in killed in a bar about two years ago?

A Yes.

Q That could be capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tried for capital murder for hiring him and he could be tried for doing **[1530]** the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in the indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if you murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A Yes, sir.

Q We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this? Do you feel those are the types of cases, generally speaking, where you feel the death penalty would be appropriate, depending on the facts and circumstances?

A Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q Okay. But depending upon those things that you mentioned earlier, do you feel, for example, a murder during a robbery where a **[1531]** person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A I think if you had a choice, you know.

Q Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing to do or it wasn't—we didn't need it or we shouldn't have it?

A Well, there again, it goes back to the situation, you know, sometimes.

Q You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A No, I've never—you know, just as far as generally speaking, I've never.

Q You feel it's proper on a case-by-case basis; is that right?

A That's the way I look at it, depending on the individual case.

Q Let me ask you: Do you see it **[1532]** serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q What do you think it accomplishes when you feel it does?

A I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, **[1533]** but sometimes, you know, you feel maybe this is not really punishing the person to give him the death penalty.

Q It's over?

A Yes, it's over and, you know, they're not really suffering from it.

Q Let me ask you this: You're a married man, aren't you?

A Yes, sir.

Q Do you know or would you hazard a guess how your wife feels about the death penalty?

A No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have feelings. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A Well, it I had to guess, I would say probably it would depend on the situation.

Q You've got three children; is that right, sir?

A Yes, I have.

Q On [sic] of them is grown, though. **[1534]** Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not guilty. Could you do that as well?

A Yes.

Q Just call it the way you see it. That's all that would be expected. Now, in the second part of the trial under the old law, the jury hear more evidence and they might **[1535]** not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence of some

number of years. If you [sic] someone ought to die for what you heard and the others agreed to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, it you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. Now, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trial—after you've heard all of the evidence, the Judge will give you two or three questions to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they proved they should be answered yes, you answer **[1536]** them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with that at all?

A No.

Q If we don't, then you, as a juror, are required to answer the question no. Could you do that as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it. Could you do that?

A Yes, I could.

Q All right. The same thing, one or more no answers equals a life sentence. Whether the Judge agrees with you or disagrees **[1537]** with you, you'll never know anyway because he's not going to say that, what his feelings are. With

all due respect to the Court, he's not in the position to tell you whether he agrees or disagrees. Now, you said you could [sic] that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all?

A No.

Q The first one, I think, is pretty much self-explanatory. It asks you whether the Defendant acted deliberately with the reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you he acted deliberately, if you hear facts that convince you that he acted with reasonable expectation that someone would die, **[1538]** you answer the question yes. If you don't, you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think is being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that words means to you in that context?

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape, robbery, burglary or an assault. It says criminal acts of violence. That may be self-defining. It may mean

what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up [sic] necessarily agree with that?

A I suppose there's always that **[1539]** chance, but there again, you never know.

Q Well, do you think that question can be answered yes or no? Would you be able to answer that question yes or no depending upon the evidence you hear?

A Based on the evidence, I would answer it accordingly.

Q Let me ask you this, Mr. Warren: Could you share with us what you feel would be the most valuable to you to permit you to answer that question yes? What would you want to know about somebody to decide whether or not this is the type of person, you know, that you would feel good about answering the question yes, "Yeah, I think there is a chance that his guy is going to commit some criminal act of violence in the future."? What would you want to know about?

A What would I want to know?

Q Yes. I'm putting you on the spot, aren't I?

A That's really hard to say, as far as being specific, what I would like to know. I guess probably I would have to know some of the background of the person, maybe something **[1540]** that happened in the past or something like this.

Q Criminal background, had he done something like this before?

A Something like this in the past, you know.

Q That he's done some other violent acts in the past?

A Yes.

Q Let me ask you: Do you think you could learn enough when you learn about what he did during the offense itself? For example, you learn about the crime itself, the capital murder itself, what he did, for example, before, during and after, like did he plan it, did he participate in the

planning, pick out the victim, the location. How about the crime itself, did he actively participate in it or was he the get-away driver? Do you see? Was he a leader or was he a follower? Was he calling the shots or just standing by? Did he have—like you said earlier, did he have to do what he did? Was it necessary that he kill this individual? Do you see what I'm getting at?

[1541] A Yes.

Q Okay. Then afterwards, you decide whether or not—how did he react to the whole thing? After killing this individual, if he did, was he feeling bad about it, crying, unhappy about it, or was he nonchalant, was he blaze [sic], another day at the office, he just didn't care. If you learn all about the offense itself, do you think you could learn enough about a person if you learn all about what he did before, during and after a crime, would it satisfy you that, "Yeah, there's a chance that this guy will probably do something like this again given the chance"? Do you think you could do that?

A Sure, there's a possibility.

Q The last question just asks basically whether or not it was an offense that involves some provocation. In other words, did the victim do or say something to provoke the Defendant into killing him. If you decide that he didn't do anything, then you answer the question yes, it was an unprovoked death. If you decide he did or said something, then you decide whether or not the Defendant acted **[1542]** reasonably or unreasonably in killing him. Do you see what I'm getting at?

A Yes.

Q Let's shift gears for just a second, Mr. Warren, and talk about what we started talking about initially and that's the offense of murder. Let me make sure you understand what murder is and what a murder is not, okay?

A Yes.

Q Because you mentioned something earlier about self-defense. Let me talk to you about the offense of murder.

Let me set the ground work. You could be on a capital murder jury. Just imagine for it for a second. We're not talking about this case or anything like that, just another case, imaginary case. Let's say it was a murder during a burglary. Let's suppose for just a minute that you hear evidence that satisfies you and convinces you beyond a doubt that the Defendant murdered this individual, but let's say you didn't hear any evidence about a burglary. Do you see? If we want to convict the Defendant of capital murder, we have to prove both the murder and **[1543]** the burglary. Do you see what I'm getting at? We didn't do that, though, did we? We only proved the murder, so you can't find the Defendant guilty of capital murder if we didn't prove the burglary. You found him not guilty of capital murder and found him guilty of murder, which is what we did prove. Am I making myself clear?

A Are you saying, if you proved the murder and not the burglary, it's not capital murder?

Q That's exactly what I'm saying. In order for that to happen—let's say that happened. Then the only thing about automatic life or automatic death—remember, as I said earlier, you can't get the death penalty or an automatic life sentence just for murder. Do you understand that?

A Yes.

Q Okay. I gather you feel pretty strongly about murder, do you not? I mean, goes without saying?

A Well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, **[1544]** you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should.

Q All right. So let's talk—you said earlier that one of the biggest factors in your decision would be whether or not a person, like you said, had to do it or had another choice; is that correct?

A Yes.

Q Okay. Now, when we talk about murder, we talk about a situation where one person knowingly and/or intentionally causes the death of another human being without any legal excuse or any legal justification. Let's talk about what a legal excuse or legal justification is. One of them was mentioned earlier. It's self-defense. You, me, Mr. Nelson and everyone here has the right to kill somebody, if it's necessary, in self-defense. If we do that, even though we might be charged with murder—if you were charged with murder and I was on the jury and I believed that you acted in self-defense, I would have to find you not guilty. It's not that I would give you a **[1545]** low punishment, but if I understood and believed that you acted in self-defense, I would have to find you not guilty. You would have to find me not guilty, if things were switched around. Do you see what I'm getting at?

A Yes.

Q So when you're thinking about the punishment for murder, the range of punishment for murder under the law—and we'll talk about that in a second—don't be thinking about self-defense because if you think somebody killed in self-defense, then you have to find them not guilty. They're not guilty of murder, so don't be thinking about self-defense.

Another justification would be, or another situation is, if you kill somebody accidentally. Even though you've been charged with murder, if I believe that you killed somebody accidentally, the gun went off by accident, the gun or a knife, whatever the case may be, I would have to find you not guilty. It's not like you say, "Let's give him some light punishment or give him probation or **[1546]** something like that." It's not guilty because that's not murder. If you believe that I was insane, even though you might not like the insanity defense because a lot of people don't, if you honestly believe that I was insane when I killed somebody, it's not murder. Do you see what I'm getting at?

A Yes.

Q The same thing holds true, let's say, for a crime of passion, something that we all can understand. For example,

you're a parent and let say, God forbid, something should happen to one of our daughters. She's sexually molested, for example. You come home and you find out that the neighbor up the street is the one who did it and he's laughing about it and you go berserk, you know. You pick up a gun or a knife and you go up the street and you kill him. Do you see? That's not murder, either. If you believe that I did that, for example, because of what reaction I had to what this guy had done to my daughter, that's not murder. That's voluntary manslaughter. Do you see what I'm getting at?

A Yes.

[1547] Q It's not murder. I want you to divorce your thinking from accident, insanity, self-defense or a crime of passion or even a reckless act where I shouldn't have been doing something because murder is a knowing and intentional act. I knew, when I killed Mr. Nelson, what I was doing and I intended to do it. Do you see what I'm getting at?

A Yes.

Q Now, the reason I mention that is this: The law—as I said, there is a completely different range of penalties for the offense of murder. I don't want to be thinking about these other things where you might say that you would give a guy a break if it happened—if I though he was insane or if I thought it happened in self-defense, any of those cases. You don't do that. You find them not guilty. What we're talking about, we're talking about murder, "I knew it." I intended to do it." "I killed somebody." There is no legal excuse or no legal justification.

Let me ask you: What do you personally feel ought to be the penalty? What do you think ought to be the minimum penalty **[1548]** for someone who knowingly and intends to kill somebody? What do you personally feel should be the minimum penalty for that sort of conduct?

A Are you speaking without any provocation or anything, just—

Q Right.

MR. CUNNINGHAM: Your Honor, we would object to without any provocation because provocation is not an element of the offense of murder.

MR. MACALUSO: I'll rephrase it, Your Honor.

THE COURT: Go ahead.

Q When we say provocation, we mean something where I would be acting in self-defense if he provoked me. I'm talking about limiting it, so don't be thinking self-defense, insanity, accident or a crime of passion, in the heat of passion. What do you think the minimum ought to be?

A Well, if I have to just give you a flat answer without knowing the case itself—

Q Well I cannot give you a fact **[1549]** situation and I'm not asking you what would you do if this happened and what would you do if this happened, what would you do if that happened. Let me ask you this: The range of penalty for murder is from five years in the Texas Department of Corrections all the way to ninety-nine years or life and up to a $10,000.00 fine. The law simple says, to be a qualified juror, if you can in all honesty, you have to set the punishment somewhere within there. If not, like you said earlier—in all honesty, if you cannot, if you don't think you could set a punishment within that range, then you need to let us know. In other words, if you saw a case that involved a murder—and I don't have time to go back and review those categories, but a murder where one person knows he's going to kill this individual and intends to kill the individual and kills him—what do you feel would ever be proper, under any facts and circumstances, to your way of thinking, to ever assess a penalty as low as five years in the penitentiary for knowing and intentional killing?

MR. CUNNINGHAM: If he **[1550]** thought that was the proper punishment.

MR. MACALUSO: Excuse me, Judge.

MR. CUNNINGHAM: Your Honor, if he felt that that was a proper punishment in that case.

THE COURT: Did you qualify it like that?

MR. MACALUSO: I believe I did. I think I said what he thought was proper based on the facts.

Q In other words, could you ever vote for five years?

A I would try to make my decision based on the case and the evidence at the time.

Q Are you saying that you could?

A I could, based on the evidence that was given at the time, yeah.

Q All right. By the same token, I gather then, if you heard facts and circumstances that called for a sentence of ninety-nine years or life, if you felt that was the proper thing to do after you heard the **[1551]** evidence, you could do that?

A Yes, if—I would make my decision after I heard the evidence. I wouldn't make the decision in advance.

Q Let me ask you this, sir, in closing here: If you had the choice of having the death penalty in Texas or not having the death penalty in Texas, how would you feel? Would you have one or not have one?

A Well, your mean just a flat yes or no on the death penalty?

Q Yes.

A Well, I probably wouldn't vote yes or no because there are cases where I do believe it probably would be proper, but there are other cases where I don't, so—

Q What I'm saying is, if you could tailor certain fact situations, do you feel that we should have the death penalty for certain types of cases?

A In certain types of cases, I do.

Q Mr. Warren, I've done most of the talking here and given you time to respond, but let me ask you: Do you have any questions of us, at all?

[1552] A Not at this time.

Q Do you know of any reason, sir, whether I've touched on it or not, why you couldn't be a fair and impartial juror to both sides?

A None whatsoever.

Q Is there any reason why you couldn't answer all three of those questions yes, if we proved that they should be answered yes, knowing that it would result in this man's execution?

A No.

Q I appreciate your honesty, Mr. Warren, with us. Mr. Cunningham and Mr. West will have some questions for you now.

MR. MACALUSO: I'll pass the witness—juror, rather.

THE COURT: Thank you. Mr. Cunningham.

[1553] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Warren, as you have been advised, my name is Brice Cunningham and, along with Mr. West to my left, we represent Mr. Thomas Joe Miller-El in this case where he stands charged with the offense of capital murder. Very briefly, I would like to ask you some questions concerning the questionnaire and possibly some questions that may have been propounded to you by Mr. Macaluso. This first question may sound like it is asinine or a question that is obvious on the face, but there are some things that we have to get at indirectly. What is your race?

A Black.

Q I notice that you live at 4123 Telstar?

A Yes.

Q How long have you live there, sir?

A I've been there about eleven years now.

Q Are you buying your home or renting your home?

[1554] A Buying.

Q You work at Kroger's as a market manager?

A Yes.

Q How long have you been with the Kroger stores?

A About twenty-one years.

Q How long have you been market manager?

A About nineteen and a half.

Q Does your wife work outside of the home?

A Yes, she does.

Q In what capacity?

A She's an operator. She operates a bagging machine.

Q How long has she been employed?

A About twenty years.

Q You're a member of Salem Baptist Church?

A Yes.

Q How long have you been a member of Salem Baptist Church?

A About twenty years.

Q Your two sons, are they in high **[1555]** school?

A One of them is, the youngest.

Q Where is the oldest?

A My oldest, he's at home, but he goes to a college here in town and works at night.

Q Which one?

A Mountainview.

Q What year is he in at Mountainview?

A He's in his second semester.

Q How long were you in the army?

A About three months.

Q You're a member of Local 540 Union, meatcutters' union?

A Yes, I am.

Q Have you held any offices in that union?

A No.

Q Is your brother still on the police force in New Jersey?

A No, he's not.

Q How long was he on the police force in New Jersey?

A I'm not sure. He was up there, **[1556]** after he got out of the service, for about twelve years. I don't know exactly how long he was on the force.

Q This mishap that you son was involved in, was that Bengy or Joe, Jr.?

A That was Joe, Jr.

Q Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?

A No.

Q That was something at school?

A Yes, it was.

Q You indicate that sometimes you see certain cases on TV and you're interested in it. You understand that anything you may have seen on TV would have no bearing whatsoever on any issues in this case?

A Yes, I do.

Q And you could put that out of your mind?

A Yes, I could.

Q Was your brother-in-law a victim of a crime in Las Vegas?

A My brother. Yes.

Q Okay. What type of crime was it?

[1557] A I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money.

Q How long ago was that, sir?

A That was about a year and a half or two ago.

Q How long have you been a member of Crime Stoppers?

A Well, the reason is, we have it in the neighborhood, you know, where we have—is it called Crime Stoppers or

Crime Watchers where, you know, you watch neighbors' homes? That may be Crime Watch, cut it's the neighborhood service thing where the neighbors watch each others [sic] homes. That's what I'm speaking of. When Chief Dyson was here, we were also involved in the other program that he had that was similar to that. I can't recall the specific name of it, though. It was similar to that. They would have little meetings in the schools and PTAs and stuff like that. It was kind of a neighborhood thing is **[1558]** what it was.

Q What part of the city if Telstar located in?

A It's in Oak cliff off of Westmoreland.

Q Do you know of any reason, Mr. Warren, why you could not be a fair and impartial juror if chosen in this case?

A None whatsoever.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: May we have just a moment, Your Honor?

THE COURT: Surely. Mr. Warren, let me ask you to wait out in the hall for just a moment, please.

(Whereupon, Mr. Warren left the courtroom, after which the following proceedings were held.)

MR. MACALUSO: We will exercise a preemptory challenge.

THE COURT: Okay. Well, I'll—

[1559] MR. WEST: I didn't hear you. Excuse me, what was that, Judge?

MR. MACALUSO: I said we will exercise a preemptory challenge.

THE COURT: Of course, I'll note that.

(Whereupon, Mr. Warren returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Warren, I'm going to excuse you from service in this case, which means you will be free to leave here and go about your business. I want to add to what I said earlier and thank you for your patience primarily with

us and the system. You were down here Monday practically all day and you're down here late this afternoon. I note from some of these lawyers questions that they felt a great deal of respect for **[1560]** you, because I do, for your answers. You're the kind of juror to me, at least, that makes the whole system work. It's people like yourself who are willing to put up with the hassle of the system to do your duty as a citizen. I wish you could serve as a juror on some cases, but evidently this is not the case. So you will be excused to go about your business. Thanks a whole lot.

MR. MACALUSO: Thank you, Mr. Warren.

MR. CUNNIGHAM: Thank you.

THE COURT: That takes care of twenty-eight.

MR. MACALUSO: Twenty-nine.

MR. NELSON: Thirty.

MR. MACALUSO: Thirty-one and Thirty-two.

(Whereupon, these proceeding are continued in Volume IV.)

* * * *

NOAD O. VICKERY

[1564] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth; was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, sir. I would like to start out by reintroducing everybody since it's been a couple of days. My name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. A third gentleman will be involved in this trial when we start the evidence: His name is Norman Kinne. Mr. Kinne is about fifty years old and is home with the chicken pox this week and will probably be there for a little while, I would imagine. I didn't like it much when I was seven years old and had them and I don't think I would like it now any more.

The three of us are assistant district attorneys here in Dallas and we've been assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Seated immediately to my left is **[1565]** Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Vickery?

Q Next to him is Mr. Royce West.

MR. WEST: Mr. Vickery, good morning, sir.

Q These two gentlemen have been appointed by Judge McDowell to handle the defense for the man at the far end of the table in the light blue suit, Mr. Thomas Joe Miller-El. Mr. Miller-El, as you've been told, is charged with the offense of capital murder, the most serious offense you can be charged with in the State of Texas.

I wanted to reintroduce everybody for two purposes; number-one, to reacquaint you and, number two, to ask you if you know any of us, either personally or by reputation?

A No, I do not.

Q Okay. Mr. Vickery, we have you in here by yourself today. I see that you have served on a criminal jury before back in '76 or '74; is that right?

A I think it was '76.

Q I would guess when you served on **[1566]** that jury you were talked to as a group sitting out in the gallery rather than individually. That's the way it is usually done.

A That's correct.

Q In front of forty or fifty people. Because this is such a serious case, we bring jurors in individually and it is hoped by doing that, because there are such strong feelings and opinions both ways on these subjects, people will be a little more open and a little more comfortable talking than they would be in front of forty or fifty other people. As best you can, we're going to ask you to relax. There aren't going to be any right or wrong answers to anything I ask you or anything I talk about. We're just trying to find out how you feel.

As you talk to me, Mr. Cunningham, Mr. West and the Judge will be listening also so that we won't have to go over the same things twice. Nobody is going to argue with you about anything you have to say and nobody is going to try to change your mind. Because of the seriousness of the offense and what we're dealing with here, we feel it necessary **[1567]** to go into some detail. I hope you will bear with me on that. Then I'm going to have to ask you some rather pointed questions from time to time. It's not because I'm nosy or I'm naturally curious. It will be some things that we need to know so that we can get the twelve people best suited to serve on this jury sitting in those chairs over there.

With that somewhat lengthy introduction, if you will bear with me, that's where we're headed in the next few minutes. I feel like it is only fair, Mr. Vickery, to tell you our position going into this case. We, Mr. Macalūso; Mr. Kinne and myself, represent the people of Dallas County and are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the persons on this jury sufficient type and quantity of evidence to convince them, number one, to convict Mr. Miller-El of capital murder and then in the second phase of the trial to convince you to answer those three questions yes. If those three questions are answered yes, the result is the death penalty. We'll talk more about that in a few minutes, **[1568]** but I feel like it is only fair for you to know going in what our position is. That's where we are and we're going to continue to seek the death penalty through out the trial with the expectation that we will be able to present to you that evidence and that man sitting right down there will be executed at some point as a result.

You had a chance on Monday, without having much time to give it thought, fill out a questionnaire. One of the questions on that questionnaire was related to the death penalty. I know this was kind of sprung on you. Most people come down here expecting to be on a civil case or shoplifting or something and you walk in here and get a capital murder, it's a little bit different.

Now that you have had a couple of nights to sleep on it and a couple of days to think about it, would you tell us in your own words your feelings on the death penalty, whether you feel it is proper or not, whether you feel like you could sit as a juror in this type of case?

A Well, sir, I've thought about it **[1569]** and I think, as a juror, that I wouldn't be deciding whether a Defendant got the death penalty or not. I would be deciding whether he was guilty or not. I think the law says that.

Q You're going to, basically, Mr. Vickery, be deciding both things. Let me just go over the procedure of the trial. Trials in Texas, as you've been through before, are two-state [sic] trials?

A Yes, sir.

Q. The first stage is going to be the guilt or innocence stage of the trial. That is when we have to prove to you the allegations in the indictment. We have to prove to you the offense of capital murder. If he is found guilty of the offense of capital murder as we've alleged, murder in the course of committing a robbery, then the issue becomes, very simply, does he get a life sentence or does he get a death sentence. Once a person is convicted of capital murder, those are the only two possible punishments, life or death.

Now up to about thirteen years ago, the legislature had made the law in such a way that the jury decided that directly. They **[1570]** would listen to the evidence and go out and put on the jury form either life or death and sign it. That was changed about thirteen years ago to a procedure where the jury answers questions rather than saying life or death. The questions are those three right there. If you want to just take a minute to go over those.

A (Juror complies.)

Q We'll talk about those in some more detail in a few minutes, but basically what the law says, Mr. Vickery, is a yes answer from the jury to each of those three questions results in the death penalty. Judge McDowell has absolutely no option at that point. He cannot say, no, I don't agree and

make it a life sentence. He cannot say, no, there is something wrong and ask for a retrial or anything else. If you answer those three questions yes as a jury, Thomas Joe Miller-El will receive the death sentence and we anticipate at some point he will be executed as a result of that death sentence.

If one of those questions is answered no, then Judge McDowell must, under the law, assess a life sentence. Again, he has **[1571]** no option. Even though the jury is actually writing life or death any more, the result is the same. Am I making myself clear about that?

A Yes, sir.

Q Okay. I was a little concerned when you said you didn't feel like the jury would be setting the sentence because, in essence, you are setting the sentence by answering those questions. Knowing that and with that explanation, I would like you to expand a little bit more, if you would, on what you were saying about your feelings on the death penalty?

A Well, I feel, as a juror, I would be sitting there having to listen to the evidence and decide—make my mind up—what I think is guilt or innocence. The laws, as you explain it to me, are written and I agree that I would have to say yes to either three questions or whatever you said, but still feel like that I don't write the law and I don't say where the Defendant gets the death penalty or not in one sense. I mean, the law says—whatever my decision is, then the law says what happens, not I.

[1572] Q Okay. I see the distinction you're making there. I understand a little better what you're saying now. Can I ask you, Mr. Vickery, how you feel personally about the death penalty? Do you feel that it serves a purpose in our society? I remember growing up that there were shows, Queen for a Day or something like that, and if you were governor for a day or if you had the power to decide in the State of Texas whether there was a death penalty or not, would you have the death penalty in certain circumstances or would you not have it at all? How do you feel about it?

A I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again as a human being, it's hard to say that you want to see someone die. I just honestly can't tell you, you know, how I feel.

Q I understand that these are difficult things and things that we don't deal with every day or think about. You know that the death penalty exists and you know it's out there, but it is something that other people are dealing with.

[1573] A That's correct.

Q You don't have to deal with it every day, but I want to emphasize and I think you realize this, it's not what somebody else is dealing with any more. Now, it's something that you're going to have to deal with if you serve on this jury. I think it is only fair that you know and understand that the effect of what you do—if the answers to those questions are yes, the effect of what you do is going to be the death of this man sitting down here at the end of the counsel table. At some point he is going to be taken from his cell in Huntsville and walked down to the death house and have an IV inserted into his arm and be injected with a lethal substance until he is dead as a result of the verdict that was rendered in this case if those three questions are answered yes.

This is something that I feel like we need to deal with and you're going to have to deal with it at some point. I know you haven't given it much thought and I don't mean to argue with you or pressure you or anything else, but you just really don't have a gut **[1574]** reaction one way or the other as far as the death penalty goes; is that what you're saying?

A Well, I guess the death penalty probably serves a purpose. You know, it's like an animal sometimes that you can't control. I don't know any other way to control them. Perhaps that is the only solution.

Q The reason I'm asking you all of this, Mr. Vickery, is, the law requires you to come down here and make yourself available for jury service.

A Yes, sir.

Q If you're suited to serve on a jury, it requires you to serve and follow the law. The law doesn't require you to do something that would be against your conscience or have such a lasting effect on you that it would influence you the rest of your life or bother you very deeply, your deep values or moral commitments, however you want to put it. Because of that the law does not require you to serve on a case like this that would violate your deep conscientious feelings or moral feelings or something like that. We want twelve people over here who—I think it's **[1575]** fair to say that nobody particularly wants to make this type of decision as a juror because it's very difficult to make this kind of decision. By the same token, we want twelve people over there who feel like they are able, without violating any deep feelings, to make this type of decision knowing that their decision may result in the death of another human being. That's the reason I keep going back to this. It's kind of like applying for a job, I guess.

If I were applying for a job, I want to know what I'm going to have to do and give some thought to whether I can do that or not before I apply for the job, before I make the decision to sign that application saying I want the job. By the same token, we want you to know going in what is going to be required of you if you take an oath to serve as a juror in this particular case.

I guess another thing to look at is—you have one son; is that right, Mr. Vickery?

A That's correct, yes.

Q He's grown now and out of the **[1576]** home, I see, but I bet you remember when he was growing up—at least the children I've been around. My little girl is four and she hasn't done this much yet, but children will come up to you and say, "Daddy, I want you to promise me something. I want you to promise you won't be mad if I tell you something." "Well, tell me what it is." "I'm not going to tell you. I just want you to promise you won't be mad before I tell you anything about it." You want to know what you're promising

before you promise to do it. That's the kind of situation we're in here. I want you to know what you're promising to do and what you're dealing with before you have to do it.

I guess what it comes down to—the bottom line is, Mr. Vickery, with that long-winded explanation, knowing that your actions could result through the system in the death of Thomas Joe Miller-El, do you feel like you could serve on a jury like this?

A Yes. I think I can make a decision. I don't think it would affect me mentally or physically. I don't think it would be a decision that I would want to make and I **[1577]** don't particularly want to make it, but I think I could.

Q Okay. You've said, Mr. Vickery, that you don't really know how you feel about the death penalty. Have you ever been opposed to it at any point? I mean, some people when they're younger and in college or whatever are opposed to it and as they get older, they become in favor of it or vice versa. Have you held strong feelings one way or the other ever?

A No, I haven't.

Q Okay. So this is just something that you haven't spent a great deal of time being concerned with because you haven't had to deal with it?

A That's correct. You know, you read about it and you hear about it, but you're put in a spot where you've got to make the decision and it's a different story. I would be like anyone else. I can sit in front of a TV and say, "They ought to hang the guy." That's just in your thoughts at that time and you're not there making that decision. You're not pulling the rope.

Q Right. And that's why we're **[1578]** telling you exactly what you're dealing with here so you know what your part is going to be in this trial and what effect your decisions are going to have in this trial. You're telling me now that, once I've given you that explanation, you feel like you could handle that duty and make that decision?

A Not because I want to, but if, I was asked to, I think I could.

Q I think I'm probably pretty fair in saying, Mr. Vickery, that nobody comes down here and wants to render a verdict that results in someone else's death. That's not going to be an easy decision for anybody because you're taking another human life and, if you have any feelings for life at all, you have a problem doing something like that. I think anybody would agree with that.

Capital murder in Texas is applicable to only certain types of offenses. The death penalty is not applicable to a regular murder case. It has to be capital murder and that means either, number one, killing a certain class of persons like police officer or a fireman or a jail guard **[1579]** and, number two, a mass murder. Third, the type of case we're dealing with here, what we call murder plus.

What we've alleged in this case, Mr. Vickery, is that this Defendant did knowingly or intentionally cause the death of another individual without any legal justification. That's murder at that point. But then we go further and we say he caused that death while in the course of committing or attempting to commit the offense of robbery. That's why we say murder plus. It's murder plus another offense happening during the same transaction basically. He not only killed someone, but be did it in the course of committing robbery.

Do you have any problem with the death penalty being an option in a case like that?

A I don't think so.

Q Okay. I've told you basically how the procedure—and you've been through it once, so you know more or less how things are going to go. In the first part of the trial we have to prove to you what is in the indictment. **[1580]** We have to prove to you that he knowingly or intentionally caused the death of another individual and they did it while in the course of committing or attempting to commit robbery. I emphasize the fact that we have to prove that. The burden of proof is here. Right now, as Thomas Joe Miller-El

sits down at the end of that counsel table, he's presumed to be innocent. If you were called upon to go out and deliberate at this point, you would have to find him not guilty, not because he didn't do it, but because we haven't proved it yet. The burden of proof is right here on this table with Mr. Kinne, Mr. Macaluso and myself. It never shifts to that table. They never have to present anything throughout this trial if they don't want to. He's presumed to be innocent and we have to prove the case beyond a reasonable doubt.

You were probably told in your other trial that there is no definition of beyond a reasonable doubt in the law. We're going to ask you to put a common sense meaning on those words and determine whether he is guilty or not beyond a reasonable doubt. Do **[1581]** you have any problem with that?

A No, I don't.

Q You feel like you could hold us to our burden of proof then?

A Yes, I do.

Q And you would make us prove our case?

A Yes.

Q Now, you, if I recall, own your own business; is that correct?

A That's correct.

Q Do you have persons working for you?

A Yes, I do.

Q Could I ask how many?

A Five.

Q So you're making decisions every day with reference to your business and your employees; is that right?

A That's correct.

Q Analyzing facts and circumstances and making a decision as to what ought to be done in response to those?

A Yes.

Q And you don't have any problem **[1582]** making decisions?

A Not any more than any one [sic] else.

Q Okay. Once that decision has been made, if he is found guilty of murder, then these questions don't come into play. Then the range of punishment is anywhere from five years up to ninety-nine years or life in the penitentiary. The death sentence is not an option if he is just found guilty of murder. We'll talk about that a little bit more.

If he is found guilty of capital murder, again there are only two options, either a life sentence in the penitentiary—and that's a sentence that is subject to the same rules and regulations and considerations as any other life sentence in the State of Texas—or a sentence of death. That's where the questions come in.

You've read them. Let's go over them in just a little bit more detail individually. Question number one: "Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" Mr. **[1583]** Vickery, what does that—what do you feel like that is asking you?

A Basically did he do it just deliberately; in other words, with the intent.

Q Okay. For example, if I took a gun and put it to Mr. Macaluso's head and pulled the trigger, it would be pretty clear that I intended to kill him when I did that?

A Yes, sir.

Q But if I take a gun and shoot at his foot and in some wild way the bullet bounced off the floor and off the wall and came back and killed him, there might be a real question in your mind whether I actually expected that his death would result from doing something like that?

A That's correct.

Q Was I deliberately trying to kill him—okay. That's pretty straight forward. Let's look at question number two.

That's a little bit more involved. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do your feel like they're asking for there?

[1584] A Well, I think just basically, if he was released and on the streets, is he a violent person and would he commit the same crime again and kill again.

Q Okay. Would you agree with me that criminal acts of violence doesn't necessarily mean that he would have to kill someone else again? There are other things that are violent like rape, for example—

A Yes, sir.

Q —or robbery or assault or something like that? Even if I took a baseball bat and hit Mr. Macaluso up side of the head three or four times, would you agree with me that that is an act of violence?

A Yes, sir.

Q I think probably a key word in that, Mr. Vickery, is probability. You're in a pretty exact business as a draftsman and you deal with pretty exact angles and figures and that kind of thing. What does probability mean to you?

A Probability would be that it is a possibility, that it possibly will happen again. In other words, there's a good **[1585]** chance—probability would be that there is a good chance it would happen.

Q Okay. A possibility or a good chance it would happen again. Now, it could be, Mr. Vickery, that the only evidence you would receive in this case is the evidence as to the offense, what happened before the offense, during the offense and after the offense. That might be all the evidence that you would receive in this case. We have the burden of proof on these questions on the second phase also as we do throughout the trial, but you may be asked to base your verdict on just the facts of the case, the facts of this particular offense itself. Can you see how that might be sufficient to make a decision on question number two?

For example, if you looked at what happened before the offense; was it something that was planned or was it a spur of the moment kind of thing; was it something where the Defendant was involved in the planning or was he not; the time during the offense, what role did the Defendant play; was he a leader, was he in there giving orders or was he kind of a **[1586]** follower; was he maybe just a lookout; could he have done something less than what he did; could he have stopped short of doing what he did and cause less damage or less violence? Third, what about conduct after the offense; was he remorseful; did he feel bad about what had happened or was it just another day at the office? Well, somebody is dead. It was kind of like killing a fly. How did he act afterwards? Would you agree with me that those kinds of things could help you in answering question number two?

A Yes, sir.

Q Is there something else that you—some additional type of evidence you would look for or be interested in in answering question number two?

A I think you've covered it all.

Q Okay. Is there one of those that would be more important than the others, one thing that would really stick out in your mind in making that kind of decision, one thing you would really look for?

A Perhaps his—not really. They all blend together, really. It just depends on **[1587]** whether a person intentionally did something, planned for it, whether he had a remorse for doing it. I would consider those.

Q Okay. That's basically question number two. Now question number three is over here on a separate board. "Was the conduct of the Defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?" That's kind of a convoluted way of putting the question. It's kind of legal ease. That's the way lawyers talk all the time. It's convoluted. Would you agree with me that that is basically asking was the killing provoked or was it an unprovoked killing?

A Yes, sir.

Q If it was unprovoked, you would answer that question yes?

A That's correct.

Q If there was some provocation, then you would have to make a decision whether, like the question says, his actions were reasonable in response to that provocation?

A Yes, sir.

Q You may get that question or you **[1588]** may not. It depends on the evidence. If it is raised by the evidence, you will get that question. If it isn't, you will just get questions one and two and those will determine what happened in this case. Again, a yes answer to both of them results in the death penalty. A no answer to either one results in a life sentence.

I want to emphasize again, Mr. Vickery, that we have the burden of proof throughout the trial, on the guilt of the Defendant and on proving those questions. We always have the burden of proof. You've got to base your verdict on the evidence. Can you listen to the evidence and can you see how those questions could be answered either yes or no depending on what the evidence shows?

A Yes, I do.

Q Okay. You will listen to the evidence and keep an open mind until you've heard all of the evidence before you make a decision both on the guilt phase and on answering those questions; is that right?

A I think so, yes.

Q Okay. That's all we ask, that you **[1589]** keep an open mind and remember that they don't have to present anything if they don't want to. The Defendant has an absolute right not to testify. If he chooses not to testify, you can't even consider that. You can't even talk about it in your jury deliberations. You know that from being on a criminal case before?

A Yes,

Q Now, Mr. Vickery, I guess probably part of the reason that the legislature puts these questions in is kind of a buffer between just an emotional gut reaction type of verdict that this guy deserves death and more of a reason type of verdict from looking at the facts of these types of questions. Are you telling us that, even if you had a gut reaction that, no, this guy doesn't deserve the death penalty, if we had proved the answers to these questions should be yes, could you answer them yes in spite of your personal gut reaction type of feelings?

A Yes.

Q Vice versa, if you believed that he deserved the death penalty, just because you're made [sic] about it or upset about what had **[1590]** happened and the facts of the case, if we failed to prove one of those beyond a reasonable doubt, could you answer it no even knowing that it would result in a life sentence and not the death penalty?

A Yes.

Q So you would base your verdict on the evidence?

A That's correct.

Q That's all we ask you to do. Now, there was one thing that we don't anticipate will happen in this case, but it might so we need to cover it with you. Do you remember that I told you earlier that capital murder in this case was murder plus another offense. If we fail to prove that second offense—if all we prove is that this Defendant knowingly or intentionally caused the death of another individual, but we don't prove it was in the course of committing robbery, then we haven't proved capital murder. We've just proved murder. I think you remember that I said few moments ago, the range of punishment for that is from five years up to ninety-nine years or life and a fine of up to $10,000.00. The death **[1591]** penalty is not an option in that case. Am I clear on that so far?

A Yes, sir.

Q If you are to be qualified to serve as a juror on this case, you have to be able to tell us that you can consider the

entire range of punishment for the offense of murder if he is found guilty of simple murder, the killing of another individual without any legal justification or excuse whatsoever, no self-defense, no accident, no killing in the heat of passion or anything like that, knowingly or intentionally killing another human being. Mr. Vickery, I'm just going to ask you, if, after hearing all the facts and circumstances, all of the evidence, you convicted a person of murder, if you feel that the facts and circumstances justified a sentence of ninety-nine years or life, could you give that sentence?

A Yes, I could.

Q The other end of it is this: If, after you convicted a person of knowingly and intentionally killing another human being without any legal justification or excuse—**[1592]** would you agree with me that there are a number of circumstances that could enter into a killing? It might not be legal justification, but a number of surrounding facts and circumstances?

A I agree.

Q They could all have an effect on something like that. If, after hearing all the facts and circumstances of the case, you convicted the person of murder, if you felt like, based on the evidence, in your own mind, those facts and circumstances justified a five year sentence for the offense of murder, could you consider that and give that?

A Yes, I could.

Q So you're telling us you could consider the entire range of punishment for the offense of murder, the knowingly and intentionally killing of another human being; is that right?

A I feel like I could, yes.

Q Obviously we can't tell you the facts of the case. We can't even give you any examples of what some facts might be. All you have to be able to tell us is, if you hear the **[1593]** case that justifies life, you will give life. If you hear the case that calls for five years in your mind, you will give five years and you will keep an open mind until you've heard all the

evidence. I think you're telling us that you can do that; is that right?

A I certainly feel that I can, yes.

Q Okay, Mr. Vickery, that's all that we ask. There is one other thing and that is, there may be certain circumstances in cases in Texas where there is only one eyewitness to a crime. For example, if you have a purse snatching or a rape, it could be the only two people there are the person that committed the crime and the victim of the crime, the person who was raped. The law allows the State of Texas to prove a case with only one eyewitness. If you believed that witness beyond a reasonable doubt as to every element of the offense, the law says that's enough and you're required to convict that person based on the testimony of one eyewitness. If you don't believe a person beyond a reasonable doubt as to anything in that indictment, you're required by the law to find him not guilty as in any **[1594]** other case. What I'm getting to is, do you feel like you could base a verdict, guilty or not guilty, as the case may be, on the testimony of only one eyewitness?

A You're not saying that would be the only proof?

Q It might be the only proof. Let me emphasize, if you believed that witness beyond a reasonable doubt as to everything in the indictment.

A If I personally believed it, I would do so, yes.

Q If you didn't believe him as to one element in the indictment or more than one, then you would find the person not guilty; is that right?

A That's right.

Q It's just like, if we presented eighty witnesses, if you weren't convinced beyond a reasonable doubt, you would find the person not guilty?

A That's right

Q Okay. So you're telling us then that you could base a verdict on just only one eyewitness; is that right?

[1595] A I feel like I could, yes.

Q Okay. Mr. Vickery, you've been very patient with me and very open about answering the questions and I appreciate it. Is there any questions you have or anything I've touched on that we need to talk about?

A I don't believe so.

Q Okay. Mr. Vickery, I want to thank you very much for your time and your patience with me. These lawyers will probably have some questions for you and I won't bother you any more. Thank you very much .

THE COURT: Thank you, Mr. Nelson. Mr. West, go ahead.

[1596] EXAMINATION

BY MR. WEST:

Q Mr. Vickery, as I was previously introduced, my name is Royce West and I have just a few questions. The purpose of these questions is basically to get to know you and test your qualifications to be a fair and impartial juror in this particular case, okay?

A Yes, sir.

Q If I talk too fast or if you don't understand my question, say, "Hold up, Mr. West. I don't understand. Slow down." Okay?

A Very good.

Q Let's just shoot off the cuff with one another. You seem to be a very straight forward person and that's the way I want you to deal with me in this situation, okay?

A Yes, sir.

Q Now, I notice from your data sheet that you're the president of Southwest Detailers Association?

A That is correct.

Q What type of organization is that, sir?

A It's an organization of owners of **[1597]** detailing firms which is a form of a drafting service.

Q How many members does it have?

A In Southwest Detailers Association, there's twenty-two members.

Q How long have you been president?

A One year.

Q You're currently the president?

A Yes, sir.

Q Are you the member of any other types of organizations?

A I also belong to the National Institute of Steel Detailing.

Q Any type of civic organizations?

A No, sir.

Q Have you ever been a member of any type of civic organization?

A I have been a member of the Chamber of Commerce is all.

Q Dallas?

A Yes.

Q Raymondsville is in the valley?

A Yes. Rio Grande Valley, yes, sir.

Q How long have you been in Dallas, sir?

[1598] A Since I was a child, about forty-seven or forty-eight years.

Q So Dallas is basically home?

A That's correct.

Q What school did you graduate from here in Dallas?

A Woodrow Wilson High School?

Q Out there by Tenison Park?

A Reasonably close, yes, sir.

Q Now, let me ask you some questions right now. You're the vice president of your own business; is that correct?

A That's correct.

Q Do you supervise two or more employees?

A Yes, I do.

Q How many employees, sir?

A Five.

Q Are any of those employees black?

A No, sir.

Q Have you ever had any blacks work for you?

A No, sir.

Q Have you ever had any apply for a job?

[1599] A No, sir.

Q Did you attend school with blacks?

A Not in high school.

Q In college?

A Yes.

Q Okay. Do you live in what you would consider an integrated community? You live in Garland, is that correct?

A That's correct.

Q Do you live in an integrated community?

A Yes, sir.

Q What percent would you say was black, brown and anglo?

A Oh, I don't know. I live in townhome addition. I would say there's probably four or five black families that live in the community.

Q Do you know any of them?

A I know them, but I don't know them well.

Q You just know them by sight?

A Well, I did know—Billy Joe Dupree was my neighbor at one time, but he moved. I knew him. He played with the Dallas **[1600]** Cowboys. He lived two doors down and I knew him, but he's the only one I knew personally other than just to meet someone at meetings and that type of thing.

Q Okay. Again, I'm not trying to pry into your life, but I need to know some things for our purposes in representing our client, okay?

A Yes, sir.

Q Based on your data sheet, it indicated that you're widowed?

A That is correct.

Q Now, when did this occur?

A Three years and three months ago.

Q Was it as the result of an accident?

A No, it was cancer.

Q Were you with your wife during her last sickness?

A Yes.

Q Now, also on your data sheet it indicates in response to question number forty-seven, "Have you, your spouse, member of your immediately family, or close friend or relative ever been a victim of a crime." You indicated **[1601]** your sister?

A That's correct.

Q "Info not know." What did you mean by that?

A It happened when she was—I was a teenager and she lived in Chicago and she was assaulted and put in the hospital. I know she came home—I was still living at home and she came home and stayed several months to recuperate. I don't know the details of that. I just know that she was assaulted.

Q That wouldn't affect your deliberations in this particular case, would it, or your ability to serve as a juror?

A I don't think so, no, sir.

Q You're saying no, it won't?

A No, it would not affect me.

Q Okay. You indicated also that your sister had been charged with, arrested, indicted and convicted of a criminal offense?

A That's correct.

Q What was that about and when was it?

A Again, I do not know the details. I know she was arrested and served time in the **[1602]** penitentiary. It was in California. Again, I was a teenager and I do not know the details.

Q Because you were a teenager at the time?

A Yes.

Q Would that affect your ability to serve as a juror in this case?

A I don't think so, no.

Q You keep on saying "I don't think so". When you say I don't think so, you're saying that's no?

A No, it would not. I'm sorry.

Q You served on a criminal jury here in Dallas in 1976?

A I think it was '76. I didn't write it down; but it was about ten years ago.

Q Do you recall what type of case it was?

A It was a theft case.

Q How many people were on the jury?

A Twelve.

Q Were you able to reach a decision?

A Yes, we were.

Q And the jury assessed the punishment?

[1603] A Yes.

Q Now, I want you to understand something concerning the burden of proof. Mr. Nelson kind of went over it, but I need to go back over it with you. You pretty well understand the nature of the criminal justice system, that a person is innocent until proven guilty?

A Yes, sir, I understand.

Q Do you agree with that premise?

A Yes, I do.

Q Do you agree that the State should have the burden of proving a citizen accused of an offense guilty beyond a reasonable doubt?

A Yes, I do.

Q Now, as Mr. Nelson indicated, you will not get a definition of what beyond a reasonable doubt is. You're going to have to basically put some common sense or put some meat on that particular bone?

A Yes.

Q Now, in making a determination as to whether or not the State has shouldered its burden of proof, you're going to have to judge the credibility of the evidence that you **[1604]** receive as a jury, okay?

A Yes.

Q Now, in judging the credibility of the evidence, you may—and I anticipate that you will—hear live testimony, someone sitting on the witness stand in the that very seat. You will be sitting over here with the jury. You're going to have to look at that person, make a determination as to whether or not that person is telling the truth or telling a lie. Let me ask you this: Have you ever had to tell whether a person is telling you the truth or telling you a lie?

A Yes, I have.

Q Okay. Now, have you ever had a situation where a so-called friend of yours does something and blames it on you? Have you ever had that happen to you?

A Probably. I don't recall for sure, but I'm sure I have.

Q Okay. Have you ever had an employee or your son or some relative of yours blame something on another relative and that relative says, "What are you talking about? I didn't do it." Have you ever had that **[1605]** situation happen to you?

A Yes, I have.

Q Have you had to make a determination as to who was telling the truth and who was telling the lie?

A Yes.

Q Okay. Some of the same factors that you used in order to make a decision, like that may very well have to be used to make a decision in this particular case.

A I understand.

Q Okay. When you get ready to make that determination, let me suggest that you use a scale from zero to ten. Ten, you believe the person is telling the truth and zero you believe that they're lying to you, okay? You can believe all of, some of and none of what a person says. Look at their demeanor. Now, one thing that I've always been told and pretty sure in your years, you've heard this also—when you ask a person a question and they start off, when they're getting ready to answer, with, well, and then ah, they're trying to buy time. wouldn't you agree with me?

A Yes, sir.

[1606] Q Then you need to take a look at that person's demeanor, you know, is he looking around, can he look you in the face and tell you the truth. Do you normally take that into consideration?

A Yes, I do.

Q I ask you to take into consideration those things when you're sitting over there and making your determination as to the credibility of the evidence that you receive. Will you do that, sir?

A Yes, I will.

Q Now, when you make that determination as to the credibility of the evidence, specifically the live testimony, and bring that to bear on the issue of reasonable doubt—well, if I believe the person one hundred percent, then I don't have a reasonable doubt as to what he or she is testifying to. When you get in physical evidence—and you may or may not get into physical evidence—judge the credibility of the weight the physical evidence was received, how it was preserved and what bearing it has on the fact in a particular case. Is there a conflict over **[1607]** the physical evidence as

to where it came from, how it came into a certain person's possession? Do you understand what I'm saying?

A Yes, sir.

Q Again, you'll probably have live testimony and you can use that testimony to make that determination, okay?

A I understand.

Q The burden of proof, it's over here at this table right here. They're two fine lawyers and they will be joined by a third lawyer, who I've worked with in the past. You will have three fine lawyers over here that know the ins and outs of the court.

A Yes, sir.

Q But keep the burden of proof on them. Make the State do its job.

A I understand, yes.

Q All right. If I were to ask you to render a verdict in this particular case right now, what would your verdict be?

A I couldn't make a decision.

Q How come?

A I haven't heard any evidence, I don't know any details.

[1608] Q So what would your verdict be?

A It would have to be not guilty.

Q All right. As my client sits here today, sits there right now, he is presumed to be innocent. The State has the burden of proof. He is presumed to be innocent as he is sitting there today. Make them prove their case, if they have a case, if they can, and if they can, in fact, prove their case. They brought the charges. They're going to have to prove it. Okay?

A Yes, sir.

Q All right. In your business—you probably make a lot of decisions in your business; is that correct?

A Yes, sir.

Q What was the last major decision that you had to make concerning your business?

A The last major decision was probably moving our offices.

Q I'm sorry?

A Moving our offices, relocating.

Q Had you developed a great deal of good will—did you move your offices?

A Yeah. Our lease ran out and we **[1609]** had to decide whether to re-lease or negotiate for a new lease someplace else.

Q You had developed a great deal of good will at your prior establishment?

A I beg your pardon?

Q You had developed a lot of good will?

A It wasn't good will, but you said a major decision. That's a business decision, you know, whether to move your offices or not. Of course, I make decisions every day as to whether to bid jobs, you know, take contracts for a certain amount of dollars, whether my company can make money at it or not.

Q So you're used to making decisions?

A Surely.

Q Would you say that you are an individual thinker?

A I think so, yes, I do.

Q Are yon easily swayed?

A I don't think so, no.

Q "I don't think so, no."

A Well, who knows if you're easily swayed? You're trying to sway me now, but I'm **[1610]** not—I think for myself is what I'm saying. I listen to other people and sometimes say, "Hey, that's a good idea. You've got a good point.", like anyone should, but I don't think anyone can sway me to do something against my will.

Q All right. In other words, even though you're sitting as a juror and collectively as a jury in this particular case, you will be an individual thinker and your decision will be based on what you perceive the evidence to be; is that correct?

A Most definitely.

Q And you will cooperate with other members of the jury in discussing the facts of the case, but if you believe strongly in a particular point, you're going to stick with that; is that correct?

A Unless they can prove to me differently.

Q Okay. So you're not easily swayed? I don't think so, no.

A I believe that I'm not easily swayed. You may believe it, but I don't.

Q Well, I don't know you well **[1611]** enough, yet. Okay. Now, can you take an oath that the mandatory penalty of death or imprisonment for life will not affect your deliberation on an issue of fact?

A Would you repeat that, please?

Q Can you take an oath that the mandatory penalty of death or life imprisonment would not affect your deliberation on an issue of fact?

A Yes.

Q You can?

A Yes.

Q Now, you had indicated on your data sheet that you weren't sure what you believed as far as the death penalty is concerned?

A Yes, I put that on there.

Q And subsequent to that, Mr. Nelson talked with you about it and you indicated, if called upon to take the job, as Mr. Nelson indicated you could, in fact, perform the job duties and responsibilities basically?

A Yes.

Q All right. Now, understanding—and since he used the analogy of a job, I'll **[1612]** try to stay with that. Understanding that there are some tasks that your job may very well call for that may very well be unpleasant, you still would be able to do that because you signed up for the job, so to speak, correct?

A That's correct.

Q Now, understanding that and understanding that the State has the burden of proof—and I'm focusing your attention to questions one and two and three, okay?

A Yes, sir.

Q As Mr. Nelson indicated, if the jury answers these questions in the affirmative, answers one, two and three in the affirmative, then the Judge will have no other choice buy [sic] to sentence my client to death by lethal injection. The State still has the burden of proof. I don't know whether that was clear or not. They must prove beyond a reasonable doubt that the allegations in special issue number one before you're required to answer that question yes. Do you understand that?

A Yes, sir.

Q It's two phases, guilt or **[1613]** innocence and then the penalty stage, if we get to that stage, first of all. If we get to that stage, the burden of proof is still beyond a reasonable doubt.

A I understand.

Q Okay. Now, focusing in on special issue number two here, Mr. Nelson asked you whether you believed that the facts and circumstances surrounding the actual incident itself would be sufficient for you to make a determination as to whether or not a person would commit criminal acts of violence that would constitute a continuing threat to society and I believe your response was yes?

A Yes, sir.

Q Would additional evidence such as the ability to change a rehabilitative program geared towards changing

violent attitudes of individuals also assist you in making a determination as to whether or not the probability exists, if you had evidence concerning certain types of rehabilitative programs that are available for individuals with violent attitudes?

A Would that have any affect on my **[1614]** decision about a particular person?

Q Right. Would it have any affect on—yes, sir—your decision about a particular person?

A I'm confused about the question, sir. I don't understand exactly what you're asking me.

Q Question number two deals with the probability of a person convicted of capital murder committing basically future criminal acts that would constitute a continuing threat to society.

A I understand that.

Q Okay. You're going to have to have evidence concerning that particular point to make a determination as to how to answer that question, agreed?

A I assume that you're saying that some evidence be presented saying that he would or would not be a menace to society or he might do it again; is that what you're saying?

Q Yes, sir. There are programs available to modify a person's behavior.

Q Are you saying could I accept the fact that possibly these programs could help **[1615]** this particular person?

Q Yes, sir.

Q [sic] I think I could consider it, yes.

Q Okay. I'm not asking you to commit to it. I'm asking you would you consider it?

A Would I consider it?

Q Yes, sir, in making your determination as to how that question should be answered?

A I think I could consider anything that was presented to me, yes.

Q Would you consider the success of those programs?

A That's a hard question to answer. I don't know what the success would be.

Q I'm saying would you consider it? I'm not asking you to commit or say, if we showed you that or the State showed you that, that you would buy it hook, line and sinker. I'm asking you will you keep an open mind and consider it in answering that question?

A Certainly, I would consider it, yes.

Q Now, as Mr. Nelson indicated **[1616]** sometimes you have a situation in a capital murder, as in this particular case, where a person is charged with what we call a murder plus, murder plus some other felony. In this particular case, murder plus a robbery. That's what makes this a capital murder case, okay?

A Yes, sir.

Q In some cases there may not be evidence sufficient in your mind to say that the individual did, in fact, commit the robbery, but you believe that the person committed the murder, okay?

A Yes, sir.

Q Now, where you have a murder, the law as promulgated by our legislature has set out some justifications for committing the offense such as, "Yes, I killed Mr. Cunningham, but I did it in self-defense." "Yes, I killed Mr. Cunningham, but I was insane at the time that I did it." Insanity, self-defense, accident, mistake, those are justifications and if believed by a jury are sufficient within itself for a verdict of not guilty. Do you understand what I'm saying?

A Yes; sir.

[1617] Q Okay. Murder, knowingly or intentionally taking the life of someone else without any legal justification, i.e., self-defense, legal excuse, i.e., insanity. Are you still with me?

A Yes, sir.

Q The range of punishment for murder is from five years to ninety-nine years or life and an optional fine of $10,000.00. That's the range of punishment in the State of Texas, okay?

A Yes, sir.

Q If you found a person guilty of knowingly and intentionally taking the life of someone else without any legal justification or legal excuse, would you sir, under the appropriate facts and circumstances in your mind, assess a penalty of five years confinement in the Texas Department of Corrections? Let me say that again. Legal justification, legal excuse, self-defense, insanity. If a person—if you were sitting on a murder case and you found that a person knowingly and intentionally took the life of someone else without any legal justification, **[1618]** any legal excuse, under the appropriate facts and circumstances in your mind, could you assess the minimum of five years confinement?

A No, I could not.

Q Why couldn't you do that, sir?

A I just don't think it would be a severe enough punishment for someone that intentionally committed murder with no reason or excuse.

Q Now, let's explore that a little bit. Again, no excuse for doing it.

MR. NELSON: Excuse me, Judge. We're going to object to that as being improper. There may be an excuse. There may be a reason that could enter into it, but—

MR. WEST: I think counsel can make a legal objection and not make a statement. If he's going to make it, I would ask that the juror be excused at this point.

THE COURT: Go ahead and make an objection.

MR. NELSON: That the **[1619]** phrasing is no legal justification or excuse, not any justification or excuse. There's a difference.

THE COURT: Go ahead and ask your question, Mr. West.

Q Again, did you understand me to say legal justification or excuse?

A I understood you to say if it was proven that a Defendant had no excuse, they killed someone and there was no excuse for doing it, would I give him only five years; is that what you're asking me?

Q If I said just excuse—legal justification or legal excuse. Now, let's explore legal justification and legal excuse so that you can understand what I'm saying, okay?

A All right, sir.

Q When I said legal justification, self-defense. You know what self-defense is, right?

A Yes, sir.

Q Okay. That's a legal justification. A legal excuse would be insanity.

A If you say so.

[1620] Q That's not what I say. That's what the law says.

A Well, I don't know the law, so I mean, if the law says so, okay.

Q I'm purporting to you that that is what the law says and, if that's not what the law says, I'm sure Mr. Nelson will jump up and object to it and make sure that you understand what the law is. So knowing that that is the law, I'm asking you again—I believe your response was that you couldn't originally—if you found a person knowingly and intentionally took the life of someone else without any legal justification, without any legal excuse, could you, under the appropriate facts and circumstances in your mind, assess a penalty of the minimum of five years confinement in the Texas Department of Corrections?

A No.

Q Never?

A Well, you're asking me to make a decision right now on what you told me—

Q No. No.

A —and I just said no. I'm not talking about any particular case, but you said **[1621]** could I and I said, no, I don't think I could give five years. You said there would be no legal excuse; is that correct? Am I understanding you correctly?

Q Yes. Now, I'm not asking you at this point in time—I can't give you an example. There are probably fifty million examples, but I can't—the law will not, permit me to give you examples right now. I'm not asking you to commit to any particular type of an example. I'm saying, if you found a person guilty of murder as I've explained it to you, can you conceive of any facts or circumstances in your mind, can you—strike that.

Now, it is my understanding if you find a person guilty of murder beyond a reasonable doubt, under no circumstances could you assess the minimum of five years confinement in the Texas Department of Corrections, is that correct? I'm not arguing with you. There is no right or wrong answer, Mr. Vickery.

A I think from what you just stated, five years would not be sufficient.

[1622] Q And you would never assess a minimum of five years?

A Never is a long time, so I'm not going to say never.

Q You would not consider the five years in making a determination, understanding what the range of punishment is, being from five years—

A No. I do not think I would consider five years.

Q There we go again.

A No, I would not consider, sir, if that's what you want to hear.

Q Well, that's not what I want to hear.

A All right. I'm sorry that my phrasing of things don't suit you, but I'm just saying, if it was proven without doubt or without any reasonable doubt and no excuse, no, I don't

think—I do not—I would not give five years, no. I think it would not be enough.

Q And you wouldn't change your mind about that?

A Well, no, I wouldn't change my **[1623]** mind.

Q And there is nothing that I can say—now, again when you responded you said without any excuse. Without any legal excuse.

A Well, that's what you said. You said to use that as a judgment and that's what I was using.

Q I'm not arguing with you. There are some laws that I disagree with and I have strong feelings about. Even though that's the law, there is nothing that I can say that would change your mind about that, if it was proven that the person committed the murder knowingly and intentionally without any legal justification or legal excuse and you found that he did that beyond a reasonable doubt, you would never assess the penalty of five years confinement in the Texas Department of Corrections? There is nothing that I can say to change your mind about that or Mr. Cunningham or Mr. Nelson or Mr. Macaluso; is that a fair statement?

A That's a fair statement.

Q Any equivocation about that at all? **[1624]**

A No.

Q Mr. Vickery, thank you for being very candid with me and very open and that's what we want all jurors to do. Have you understood everything that I've said?

A I hope so.

Q When you say that you hope so, I've got to ask you, what do you mean?

A Well, you have to assume that I understand everything. You're using some legal terms and things that a layman like me is not accustomed to listening to sometimes.

Q I try not to use six-bit words.

A I know you do, but I'm just saying you start saying without legal excuse and things like that, I'm not accus-

tomed to hearing words like that and I have to sit here and sort them, you know.

Q Again, let's make sure that you understand that. When I said legal excuse or legal justification, those six-bit words, and really what they mean is self-defense, insanity, accident—

A Well, to clarify anything [sic], you're asking me—and there is some slight **[1625]** misunderstanding possibly, but you're asking me that, if a Defendant was found guilty without any legal justification or excuse, whatever the terminology would be, such as self-defense—

Q Insanity.

A —insanity, would I only give the Defendant five years minimum, would I consider it? I said no, I would not consider it.

Q So we understand each other then?

A Yes, I hope so.

Q I'm not talking about a situation where say a father comes home and his daughter has been raped or something like that and he finds out that it was the neighbor down the street and under the influence of that, he comes home, sees his daughter, he grabs his gun and runs down there and he blows John's brains out. That is not murder. That is voluntary manslaughter. It was done under the influence of sudden passion caused by the event itself. That's not murder and that's not what we're talking about.

A I understand that, yes.

Q Okay. Thank you very much, sir, for being candid.

[1626] MR. WEST: Your Honor, I would submit the juror for cause.

THE COURT: Mr. Nelson, you can take a couple of minutes.

[1627] EXAMINATION

BY MR. NELSON:

Q Mr. Vickery, I'm not going to argue with you, but you said just a couple of minutes ago—I know we've been

throwing a lot of stuff at you, a lot of legal terms that you've ever had to hear or deal with before. I want to go back into the range of punishment on a murder case because we talked about it for a couple of minutes when I was talking with you and I thought I remembered you telling me at that time that you could keep an open mind and consider the entire range of punishment.

Now, Mr. West is exactly right. We're talking about the knowing or intentional killing of another human being without any legal justification or legal excuse. If it is self-defense, if the jury finds it is self-defense, then the person is not guilty. If the jury finds that it was an accident, the person is not guilty. If it is an enraged killing, the immediately [sic] influence of sudden passion, that's voluntary manslaughter. Would you agree with me that there is—the best word I've found to use—a myriad of circumstances that **[1628]** could surround one person killing another person? I imagine if we sat here for days, we could come up with different fact situations and different relationships and that kind of thing that could enter into it. Would you agree with me on that?

A Yes, I would agree.

Q Okay. Now, you can consider, in a murder case—I can't give you any examples or facts. I'm not allowed to under the law, but you can consider the prior relationship between the parties. You can consider events leading up to the killing. You can consider all the surrounding facts and circumstances, things that have gone on for years and years between these parties, other relationships that enter into it. You can basically consider everything in a murder case.

MR. WEST: Your Honor, I would object. That is not a correct statement of the law.

THE COURT: Well, I'm not sure I understand the objection.

MR. WEST: It's an improper question.

[1629] MR. NELSON: Judge, I'll withdraw that.

THE COURT: Restate it because I think the objection is probably good because that's sort of a general phrase.

Q You can consider all of the pertinent, relevant surrounding facts and circumstances.

MR. CUNNINGHAM: That were admitted during the trial.

THE COURT: I think that is understood.

Q Well, if you don't hear it, you can't consider it, obviously?

A Yes.

Q You can consider all of that and we can't even ask you at this time, Mr. Vickery, to conceive of a situation in which you would give five years. You don't even have to be able to think of one. All you have to be able to tell us to be qualified is, if after you've heard all the surrounding facts and circumstances, you've heard everything about the person involved, you've heard everything **[1630]** you're going to hear about the Defendant that you have found guilt [sic] of committing this murder and you know everything you're ever going to know about this case, if at that point in your own mind based on the evidence and the facts and circumstances you believed that five years was an appropriate sentence, would you give five years?

A If I believed it, I would, yes.

Q That's all we're asking. All we ask you to do, Mr. Vickery, is keep an open mind and listen to the evidence and make a decision based on the evidence and I think you're telling me you can do that?

A Yes.

Q If the evidence in your mind justifies and calls for a verdict of life, you will give a verdict of life?

A That's right.

Q If the evidence in your mind justifies and calls for a verdict of five years, you would give a sentence of five years, is that right?

A That's right, but it's contradicting what I told Mr. West. You're **[1631]** putting it in a different phrase and terminology than he did.

Q I understand. We work with words obviously down here. If I wasn't correctly stating the law—

A But you asked me if I believed that five years was sufficient, yes, I would do that.

Q Okay. That's all we're asking, if after you've heard the facts, if you believe five years is the sentence that is justified and called for, would you give five years?

A If that's the way I believed, yes.

Q If you believed a thirty year sentence was called for, you would give that and the same with a sixty or a fifty-five or whatever, you would give whatever the evidence showed you should give within the range of punishment?

A Yes. You're talking about twelve people making the decision, are you not?

Q Right.

A We're debating it and discussing it?

Q Right. Each side, Mr. Vickery, is **[1632]** entitled to a jury of twelve people who can consider that entire range of punishment. If the facts show, assess the minimum. If the facts justify it, assess the maximum or anything in between.

A Yes.

Q You're telling us that you can do that; is that right?

A Yes, I can.

Q You may not even be able to conceive of a case. It may be a case that you don't see for the next ninety-nine years, but if it's here and it's justified, you will give the minimum sentence; is that right?

A If I believed the minimum sentence is fair, then that's what I will give.

Q Thank you, Mr. Vickery.

MR. NELSON: Judge, we submit that Mr. Vickery is qualified.

THE COURT: I will hold that he is qualified, Mr. West, but you have some time left.

[1633] EXAMINATION

BY MR. WEST:

Q Mr. Vickery, you indicated the difference in the language that we were using, what was the difference in the language?

A Well, sir, you asked me if a Defendant was proven guilty or found guilty of murder without any legal excuse, you asked me would I give him five years. You didn't ask me if I believed five years was sufficient would I do that. You just asked me would I.

Q Then you misunderstood what I said. I said under the appropriate facts and circumstances in your mind, could you assess a penalty of five years?

MR. MACALUSO: In a proper case.

Q In the proper case, could you assess a penalty of five years. Now, let me go back over it. This is what I'm saying: In [sic] a murder case where you found that a person knowingly and intentionally took the life of someone else without any legal justification or legal excuse, could you under the appropriate facts and circumstances in a proper case, **[1634]** assess the minimum of five years confinement in the Texas Department of Corrections?

A Taking all the circumstances, I would—you know, you would have to take all the circumstances and comprehend like it was explained to me. I could consider five years, but you put it kind of point blank to me. This guy is found guilty, can you give him five years for murder and I said I don't think so.

Q I'm saying under the proper facts and circumstances in your mind, could you not only consider it but, in the proper case, assess five years confinement. You know, it's one thing to say, yeah, I'll consider it, but in the proper case and if the circumstances warranted it, would you not only consider it, but also assess five years?

A I think if it warranted it. In other words, if the circumstances were presented to me for me to consider five years and I think five years would be a fair punishment do to the circumstances, yes. Prior to this you were implying to

me or I was interpreting that you were saying this guy is guilty, now can you just give him five years. **[1635]** I mean, there's no circumstances involved.

Q Again, it was miscommunication. I apologize for that. But you're saying that you could, in the proper case and under the proper facts and circumstances, consider and also assess a minimum of five years where you know that there is no legal excuse or no legal justification for the murder? He killed him and he intended to kill him.

A Depending on the circumstances, yes. It depends on what is presented to me to take under consideration.

Q And you can take an oath saying that you could do that?

A Yes, I could take an oath.

Q That's all I'm asking.

MR. WEST: Nothing further, Your Honor.

THE COURT: What says the State?

MR. NELSON: Judge, we would be pleased to accept Mr. Vickery as a juror on this case.

THE COURT: Mr. West?

Mr. WEST: Your Honor, we **[1636]** would exercise a challenge.

THE COURT: Mr. Vickery, you're going to be excused from service in this case, which means you can leave here and go back to your business. I appreciate your great patience with us. You've been very thoughtful. Good luck to you in your business

(Whereupon, Mr. Vickery left the courtroom and the following proceedings were held.)

THE COURT: My understanding from the lawyers is that the lawyers have agreed to excuse juror number thirty-four, Mr. Bogart and juror number thirty-six, who is Mr. Weaver; is that correct?

MR. CUNNINGHAM: That is correct, Your Honor.

MR. WEST: That is correct; Your Honor.

THE COURT: That leaves us

* * * *

[1796] EDWIN L. RAND,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Mr. Rand, I'm sorry. We're having a little trouble getting organized this afternoon it seems to get going. I'm sorry to make you sit up there for a minute. I want to kind of reintroduce everybody. You heard us in front of the whole group earlier this morning. To begin, my name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. The third person that will be involved for the State of Texas is a gentleman by the name of Norman Kinne. Mr. Kinne is about fifty years old and is home with the Chicken Pox and has been for a couple of weeks. Having had them as a child, I can sympathize with him. I certainly wouldn't want to have them at fifty years old, but that's what he's dealing with. The three of us are assistant district attorneys and it will be our responsibility to [1797] handle this case for the State of Texas. We've been assigned to handle it by Henry Wade, your elected district attorney. Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Rand?

Q And to his left is Mr. Royce West.

MR. WEST: Mr. Rand, good afternoon.

Q These two gentlemen have been appointed by Judge McDowell to defend Thomas Joe Miler-El. He's the man at the far end of the counsel table from me. You may be able to see him or you may not from your position there. Mr. Miller-El is charged with the offense of capital murder. That is the most serious offense in the State of Texas. Because of that—have you been on jury service before, Mr. Rand?

A No, I haven't.

Q Normally in jury service, you would be seated out in the gallery with the entire group, kind of like you were this morning, and question would be asked and some things would be discussed out there in front of [1798] the entire group rather than one on one or one on five like we're doing it here. The hope is, that because these issues are so serious and people have very strong feelings one way or the other on what's involved in this case, by you being in here individually, you will be able to feel that you can talk more openly and hopefully be a little bit more relaxed, at least as you can be while you're up on the witness stand and we're out here. The big thing that we would like you to do is relax and remember, Mr. Rand, that here are no right or wrong answers to anything any of us are going to ask you today. We're just trying to find out how you feel. No one is going to argue with you or try to change your mind about anything, but we feel like you need to know what you're dealing with and what's going to happen and, of course, we need to know how you feel about some things, so we can get the twelve people best suited to serve in this jury sitting in those twelve chairs over there.

Now, we've talked to—you're the thirty-seventh person we've talked to in this trial and we have two jurors at this point, so [1799] you can see it's a rather tedious process and things take a while. Not everyone is suited to serve on this particular kind on case. With that rather lengthy introduction, that's why we're talking to you individually and, if you will just be as open and honest as you can be with all of us, Mr. Cunningham, Mr. West and the Judge, who will be listening at the same time I'm talking to you, if you will be as candid as you can be, then that will help us what we need to do and find out whether you're the kind of person suited to serve on this king of jury or not, okay?

A Okay.

Q Now, Mr. Rand, I feel like you have a right to know what our position is right now. Our position doesn't really count and your does, but I want you to know where we're coming from. The State of Texas is actively seeking the

death penalty for Thomas Joe Miller-El, that man sitting right down there. We feel like we could present to twelve jurors the type and the quantity of evidence that will convince them to find him guilty of capital murder and the type and quantity of evidence **[1800]** that will convince the jury beyond a reasonable doubt to answer those three questions yes that result in the death penalty. Judge McDowell has no options. If those three questions are answered yes by the jury, he must assess the death penalty, period, no ifs, ands, or buts about it. If one of those questions is answered no, he must assess a life sentence. Again, he has no options, so its [sic] up to the jury what's going to happen in this case.

Now, with that—I know you had a chance this morning to fill out a questionnaire, but you didn't have a whole lot of time and we were shuffling in and out of the courtroom while you where trying to do it. Maybe over lunch you had a little but more time to think about it, but would you tell us just briefly how you feel about the death penalty?

A That's kind of a touchy subject. In my own opinion, I think it could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation.

Q Okay. Have you given it any **[1801]** thought before today, Mr. Rand?

A No, not serious thought.

Q I understand that you haven't had a whole lot of time to think about it today, since you just found out three or so hours ago what the situation was?

A I think I've always pretty much had that same attitude toward it, though.

Q That was going to be my next question, how long you have felt the way that you do now. You're not married, are you, Mr. Rand?

A No, sir.

Q Did you grow up here in Dallas?

A Yes, I did.

Q Are your parents here?

A Yes.

Q Would you venture a guess as to how your parents might feel about the death penalty?

A No, I couldn't because we haven't talked about it.

Q You-all haven't discussed it at all?

A No.

[1802] Q Okay. Do you have any brothers and sisters?

A Yes, one of each.

Q What about them, do you have any idea how they feel about the death penalty?

A No.

Q Okay. Well, you say you've felt this way for a period of time. Let me just tell you briefly, the death penalty in Texas only applies to, what we call, capital murder and that is murder in a specific situation or a specific set of circumstances; one, the killing of a police officer or a fireman when they're on duty or the killing of a prison guard. That's capital murder. Another type, as I think the Judge mentioned this morning, is a mass murder like we had at a bar a year or two ago. The third kind is what we're dealing with here. As the judge mentioned, it's what we call murder plus. It's murder in the course of committing another offense. In our case, it's the offense of robbery.

Basically, what we've alleged in the indictment, Mr. Rand, is that this Defendant, Thomas Joe Miller-El, did knowingly **[1803]** or intentionally cause the death of another individual and that's murder, plain murder, but we've gone on further and said that he cause the death of that individual while in the course of committing or attempting to commit the offense of robbery. Now, we've got murder in the course of committing robbery. Is that the kind of thing that falls within your idea of a crime for which the death penalty should be considered?

A Yes, because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing.

Q Okay. Let me just touch on that for a minute, since you brought it up. We talked about murder in the State of Texas. We're excluding things like self-defense or accident or insanity. If something was done in self-defense and the jury finds that it was done in self-defense, then that person is not guilty of the offense of murder. By the same token, if it's an accident, they didn't knowingly or intentionally cause the death of someone, but it was an accident, then it's not murder. It's a not guilty or maybe an **[1804]** involuntary manslaughter or something like that, but it's not murder. If a person is found to be insane, they're not guilty if they were insane at the time they committed the offense.

Basically what you're telling me is, you could consider the death penalty for this type of case; is that right?

A Yes, sir.

Q Now, Mr. Rand, I don't like to pidgeonhole people and I don't really like to put people into categories, but I guess it kind of serves a purpose for me in this situation. I guess there are about four categories of people who come in and talk with us on cases like this. The first category is the person who comes in and believes in the death penalty, believes strongly in the death penalty, and says "I can sit on a jury and I can listen to the facts and I can assess the death penalty if it is warranted. I can handle that." The second group would be a person who believes in the death penalty. There's no question about that, but for moral or philosophical or religious reasons, whatever, **[1805]** they don't feel like they're the type of person who can sit on the jury and actually be involved in assessing the death penalty. They feel it's right and they feel it serves a purpose, but they don't feel like they could be the ones to actually do it. The third group is a group of people who are against the death penalty, but they don't really feel all that strongly about it. If called upon to serve on a jury and answer some questions, they could do that even knowing it would result in the death penalty. Although they don't really believe in it, they just don't feel that

strongly one way or the other. The fourth group is a group that doesn't believe in the death penalty and will not be involved in assessing the death penalty under any circumstances whatsoever. Can you give my an idea of where you fit in those groups?

A Probably in between the first two, sitting in the jury an being able to say, "Okay, he's guilty." and [sic] being able to do that. But again, somewhere along the line, I would probably think to myself, you know, "Can I do this?" You know, right now I say I can, **[1806]** but tomorrow I might not.

Q Okay. Well, let me just kind of—you know, lawyers, when we're picking juries and talking about things, we kind of talk in the abstract. We talk about, well, could you do this in a case, could you give the death penalty in some case, somewhere, you know, but now, as you've realized, I guess, from this morning, this is real. We're here now and we're talking about that man sitting right there. In this case, if the evidence is presented the way we anticipate it will be presented, we will ask you, number one, to find him guilty of capital murder. We will ask you to find that the answer to those three questions are yes, a yes answer to each of those three. Now what that means is, that man right down there, Thomas Joe Miller-El will be, at some point, taken to Huntsville, Texas and he'll be placed on death row and, at some point, he will be taken to what's called the death house in Huntsville, Texas and he will be strapped onto a gurney and an IV will be inserted into his arm and, as he lays there, a substance, lethal substance, will be injected **[1807]** into him until he is dead and that will be as the result of the verdict that twelve jurors rendered in this particular case. Now, I don't say those things to scare you or to make things seem horrible, but I feel—it's just like applying for a job, Mr. Rand, we feel like you need to know what you're getting into because once you have a seat over there, it's too late to say, "Hey, wait a minute, I just can't do something like that." Although we can't go into the facts of the case and we can't go into any of the circumstances surrounding the case, I want

to tell you as much as I can about what you're going to be dealing with so you can tell me now whether you can serve or not serve on this kind of case. Let me assure you of one thing. I told you that we have talked to thirty-seven people or thirty-six before you and we have two jurors. It's no great sin or it's not bad citizenship or something like that if you can't serve on this jury. It's a big decision and it's—

MR. CUNNINGHAM: You Honor, we're going to object to counsel for the State inferring that this **[1808]** panelist cannot serve on this jury. Everything that he has said so far indicates that he is qualified both by the law and by the questions that Mr. Nelson has asked him.

THE COURT: Overruled. Go ahead.

Q I don't mean to infer anything on way or the other, Mr. Rand, but you made the comment that you don't know what you're going to feel like tomorrow when it really comes down to it and that's why I'm asking you. Nobody is going to force you to do something that's going to violate your conscience or bother you so much that it's going to affect your deliberations or going to affect you deeply and emotionally for the rest of your life. No one is going to ask you to do that. I go back to my job analogy. The Judge told you about the oath that you would have to take if you're going to serve on this case, I will a true verdict render according to the law and the law and the evidence. Some judges put so help me God on it and some don't, but that's the oath. You don't **[1809]** have to take the oath. If it's going to bother your conscience or you just don't feel that you can, in good conscience, do something like that, no body is going to ask you to do that. Again, I've rambled on and rambled on about things and I'm not giving you much time to talk or think, either one, but I don't mean to do that. It's difficult not sitting over there right now, I know that, but we need to ask you what—do you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes, I do.

Q Okay. Now, you hesitated a few minutes ago and—

MR. CUNNINGHAM: Your Honor, we'll object to that. He didn't hesitate.

[1810] MR. MACALUSO: Excuse me, Judge. There's nothing wrong in making a legal objection, Judge, but—

MR. CUNNINGHAM: Your Honor, we would object to he statement by Mr. Nelson that he hesitated. The prospective juror did not hesitate. The first time he nodded his head and the second time he said yes and then the third time he said yes.

MR. MACALUSO: That's not a legal objection, Judge.

MR. CUNNINGHAM: Your Honor, I object to him inferring that the prospective juror did something that he did not do.

THE COURT: I think Mr. Rand is taking care of himself pretty well. Overruled. Go ahead.

Q Let me rephrase what I was saying, Mr. Rand, and, if I say anything at any time that misstates anything you've said or if there's anything you don't agree with. I hope **[1811]** you'll tell me. I think you will. You've been talking and you're strong enough to tell me if I say something wrong or something you don't agree with. I want you to, but I remember you saying a few minutes ago that, well, you could today, but you aren't sure of how you'll feel tomorrow. That's what I was coming back to, have you given it enough thought now that you feel like you're pretty certain you could do something like that?

A Yes, I do.

Q Okay, So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did it

while in course of committing or attempting to commit robbery, you will find him guilty of that, if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

[1812] A Yes, I would.

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

Q You're telling me you can do that?

A Yes.

Q Now, Mr. Rand, under the old system, up until about thirteen years ago, the jury, on a capital murder case, actually went out on punishment deliberations and put on the verdict form life of death. There was no answering questions. Thirteen years ago the legislature implemented this procedure, using these questions and saying that the jury has to answer questions rather than saying life or death, even though, you understand, the effect is the same. We're getting to the same place, but we're just using a little different road to get to it.

Now I guess that's put in there **[1813]** as kind of a buffer and that brings me to my next question. If after you've listened to all the evidence and heard all the evidence, if you're so mad, so enraged by what you heard that you thought this guy has to have the death penalty, period, he just must have it based on the facts, that's the way you feel, but we present evidence and we don't prove the answer to question number two is yes, in spite of your feelings and in spite of you thinking you're so mad that he's got to have it, that's all that is good for him, could you still answer that question not realizing that it would result in a life sentence rather than a death sentence?

A If it wasn't proven to me.

Q Okay. The other side is, if we proved to you that each of those questions should be answered yes, beyond a reasonable doubt we proved that to you, even though you feel that he should get a life sentence, can you answer those questions yes knowing that results in him being executed, even though you personally feel he should get a life sentence?

A Yes.

[1814] Q Any problem with that at all?

A No.

Q Okay. Now, Mr. Rand, we talked a little bit about murder a few moments ago and you mentioned that you could consider the death penalty if there was no self-defense and no accident and that kind of thing. Let me touch on that again. If we proved to you—and we aren't saying this going to happen in this particular case, but it might. Under this indictment, we have to prove to you murder in the course of committing or attempting to commit robbery. If we present evidence to you and all we prove is murder, he knowingly or intentionally caused the death of another individual and we don't prove anything about robbery at all then, would you agree with me, all we have then is just straight murder, not capital murder—

A Yes.

Q —because we don't have the extra crime? Okay. Now, when we talk about murder, we're saying knowingly or intentionally caused the death of another individual. We aren't talking about self-defense where people were in **[1815]** a fight and one guy pulled a knife and the Defendant shot him or something like that. We aren't talking about accidents where it wasn't knowingly or intentionally. It was an accident. We aren't talking about insanity where the law says the man was insane. We're talking about the person knew he was going to kill, intended to kill and killed without any legal justification or excuse whatsoever. Okay. Even if it was a killing in the heat of passion where someone is just so

enraged about something that had happened to a member of his family or something that they went and shot the guy that did it, that's not murder. That's voluntary manslaughter. It's not murder. What we're talking about is knowing or intentionally causing the death of another individual, not in the heat of passion or without any legal justification or excuse whatsoever. Okay. Are you with me on that?

A Yes.

Q Okay. What do you feel should be the minimum possible punishment for the knowing and intentionally taking of another human being's life without any legal justification or excuse?

[1816] A I think I could still go with the death penalty on that.

Q You would still go with the death penalty on that. Okay. So you feel, if one person takes another person's life, that kind of—I guess the phrase I've heard used from time to time is an eye for an eye kind of situation, is that right, one person takes another person's life, he should forfeit his life?

A Yes.

Q Okay. Would you ever, ever consider a punishment as low as fifteen or twenty years?

MR. CUNNINGHAM: Your Honor, we would object to the form of the question in that the law says—the law sets out what the range of punishment is. I think it is being totally unfair to this prospective juror to try to commit him to a particular number of years without telling him what the range of punishment is and also telling him what the law says his **[1817]** duty would be.

MR. NELSON: I'm not trying to commit him, Judge. I'm just asking what he can consider, what he can think about, what his feeling are.

THE COURT: I'll overrule the objection, Mr. Cunningham. I'm going to give the lawyers, as you know, a lot of leeway here during voir dire to approach subjects the way

they want to as long as the get to the right point eventually. I think we'll see that, so I'll overrule the objection.

Q After all that, Mr. Rand, we're back to my question. Do you feel like for the knowing and intentional taking of another human being's life without any legal justification or excuse could you even consider a sentence as low as fifteen of twenty years?

MR. CUNNINGHAM: Your Honor, we'll object to that question in that it improper because he **[1818]** left out if it is proved beyond a reasonable doubt in the proper facts and circumstances of that case.

THE COURT: Reask the question, Mr. Nelson.

Q Mr. Rand, maybe I didn't make myself clear. I thought I did. Obviously, if we don't prove the case beyond a reasonable doubt, you're going to find somebody not guilty, right, because that's our burden of proof?

A Right.

Q But assuming that we prove that the person knowingly or intentionally, no accident, not self-defense, knowingly or intentionally kills another human being without any legal justification or excuse whatsoever, then could you ever consider a sentence of fifteen or twenty years, down in that range?

A If that's the maximum penalty, yes.

Q If that's the maximum penalty?

A Yes.

Q Okay. Mr. Rand, the law in the **[1819]** State of Texas says that the maximum penalty for the offense of murder, not capital murder, but simple murder, is ninety-nine years or life and a fine of up to $10,000.00. That's the maximum. I take it you wouldn't have any trouble considering the maximum, if that were the maximum, is that right?

A Right.

Q If you had your personal way, you would want to consider the death penalty in that situation?

A Well, if it was proven that it was a capital murder.

Q Okay. That's all we ask. Obviously, you can't give the death penalty for a regular murder case?

A No.

Q The minimum under the laws of the State of Texas is five years for the offense of murder. Now, could you, again, for the knowing or intentional taking of another human life, under the proper facts and circumstances, give a sentence of five years for knowingly and intentionally taking another human life?

MR. WEST: Your Honor, **[1820]** again, improper question, improper as to the form. If he felt as though the case—I'd ask that this be added: If he felt as though the fact and circumstances warranted an assessment of five years. He's trying to get him to commit to five years without telling him if he actually felt it warranted a five year penalty. I would object to the form of the question.

THE COURT: Mr. Rand, the question is, in a proper case, if the facts and circumstances warranted it, where you had found someone guilty of the offense of murder and you thought that five year sentence was proper could you assess it?

MR. RAND: Yes, if that's the sentence that could be given.

THE COURT: Go ahead, Mr. Nelson.

[1821] Q Mr. Rand, you, as a juror, would decide what sentence is going to be given. Okay. You wouldn't be required to give five years. You aren't required, as a juror on a murder case, to give five years. You can give anywhere up to life or ninety-nine years, I thought I heard you saying—and I was having a little trouble hearing because you were talking to the Judge—that you could do that if that was what the law required or if that was what you had to do?

A Yes. If that what was put upon me, to say, "Okay, he's guilty and we're going to give him five years," would I go along with that, yes.

Q Okay. Somebody is not going to tell you that you have to give five years. That's your decision. If you can't

consider and assess five years, under the proper facts and circumstances, then that's fine. Nobody is going to argue with you, but we're just trying to find out because, again, we're going to have to have twelve people who we feel are suited to serve on this particular kind of case. This is part of that, so I guess I'll ask the question **[1822]** again. Could you give five years in a proper case where the facts and circumstances justified it or would you, from what you've told me, want to give more than that?

A I want to give more.

Q Okay. Are you telling me, if the facts and circumstances—well whatever the facts and circumstances, you could not give a five year sentence for the offense of murder, knowingly or intentionally taking another human being's life?

MR CUNNINGHAM: Your Honor, we'll object to the form of the question because, again, it leaves out the—what the law says, if he felt under the facts and circumstances of that case it warranted five years, could he give five years.

THE COURT: Reask the question, Mr. Nelson.

Q You said earlier, Mr. Rand, that you even thought a person like that should get death. If you were setting the laws, you would allow death to be considered, is that right?

[1823] A Yes, I would have to consider it.

Q Okay. But is there any way that you could consider five years for knowingly and intentionally taking another person's life?

MR. WEST: Your Honor, again, I would object and my objection is that it is an improper question. Improper question in that the question should be, under the proper facts and circumstances in Mr. Rand's mind, if he thought the facts and circumstances warranted it, could he consider and also give five years for murder as Mr. Nelson described it?

THE COURT: Do you understand the question, Mr. Rand?

MR. RAND: I think so. What he's saying, warranted, does he mean, okay, this what is going to be given or exactly what is it?

THE COURT: Well, I think you've answered the question properly. Mr. Nelson, go ahead. **[1824]** Reask the question.

Q Mr. Rand, again, when we talked about—when you've heard me use the work warranted, no one is going to dictate to you as juror, what the sentence must be. Nobody is going to dictate to you that it must be five years, any more than anyone is going to dictate to you that it must be twenty years or it must be forty-five years or anything else. If you're a juror on a murder case, you're the one who is going to make that decision yourself. What we're asking you, basically, is—you've already found somebody guilty of knowingly or intentionally taking another human life without any legal justification or excuse. Are with me to that point?

A Yes.

Q Okay. Once you've found them guilty of that, could you ever, under the proper facts and circumstances, vote for a sentence for five years in the Texas Department of Corrections for the offense?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question because it eliminates that **[1825]** part that the law says it should have and that is, if he felt that the facts and circumstances of that case called for five years, could he consider it and do it.

THE COURT: Go ahead ask the question.

Q Mr. Rand, let me just put it as simply as I can put it. Would you ever feel five years was justified under any facts and circumstances for the offense of murder?

A No.

THE COURT: What was you answer, sir?

MR. RAND: No.

Q You've told us, I think, that you feel death should be proper. If you were setting the law or you were making

the laws yourself, you would feel that death should be proper consideration under those circumstances?

Q Yes, it should be considered.

Q Okay. Now, Mr. Rand, I remember an old show years ago called Queen for a Day. If you were governor for a day and you could set the minimum punishment in the State of **[1826]** Texas for the offense of murder as I've stated if out, knowingly or intentionally causing the death of another individual, what would you set?

A Probably the maximum that you gave me, ninety-nine or life.

Q Okay. You would set that as the minimum?

A Yes.

Q Okay. And there's no way you could ever consider and give five years for that offense; is that right?

MR. CUNNINGHAM: Your Honor, again, we object to the form of the question. It's an improper question the way he asked it of this prospective juror.

Q Under any facts and circumstances, as long as it's a murder the way I've laid it out?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question. It's an improper question.

THE COURT: Ask the question **[1827]** again or I'm going to take it over.

Q Mr. Rand, am I confusing you?

A No.

Q You think you understand what I'm asking?

A Yes.

Q Okay. I certainly don't mean to confuse you and, if I didn't tell you at first, I'll tell you now. If I am or if you have a question, ask it, because I want you to be clear on what we're talking about.

A Okay.

Q I thought I understood you to say, if you could set the minimum, you would set the minimum at life or ninety-nine years and you would have death be a consideration?

A Yes.

Q Now, I thought you told me that, under no facts and circumstances, ever, would you consider a sentence of five years; is that right?

A Right.

Q Okay. Mr. Rand, I told you up front that I'm not going to argue with you and **[1828]** I'm not. I would guess from what you've told me—and you've been pretty definite about it—even if I sat here and talked to you for two weeks, I wouldn't change you mind on it, would I?

A No.

Q And that's the way you feel about it and that's the way you're going to feel about it; is that right?

A Right.

Q Okay. I don't have any problem with that and nobody is going to argue with you or try to change you mind at all. I guess nobody could, if they wanted to; is that right?

A Right.

Q Okay. Mr. Rand, no one has a right to argue with you about that and no one should argue with you about that because that's your opinion and that's why we have up here, is to find out how your feel about things, so I'm sure nobody else is going to argue with you about it, either. I'm about [sic] of time and I've thrown a lot of stuff at you. You've been very open and honest with me and I appreciate that. Do you have any questions for me? Is **[1829]** there anything else we need to touch on here that I haven't touched on?

A No. I think everything is pretty clear right now as far as what you've asked me. I think I've understood everything.

Q Okay. I don't think I have any other questions for you, Mr. Rand, if you don't have any for me. There's no way, even if I kept discussing it with you, I could change your

mind, so I'm not going to bother you any more. I appreciate very much your time and your patience with me and the openness of your answers. These lawyers will probably want to talk to you a little bit. Thank you very much.

MR. NELSON: Your Honor, we'll submit the juror.

THE COURT: I'll add a couple minutes onto your time to cover that submission, if you want to.

MR. WEST: If it please the Court.

THE COURT: Go ahead.

[1830] EXAMINATION

BY MR. WEST:

Q Mr. Rand, my name is Royce West. How are you doing this afternoon, again?

A Okay.

Q Okay. First of all, let me assure you that no one is arguing with you. Did you feel as though Mr. Nelson was arguing with you about anything?

A No, not really.

Q Okay, I'm not going to argue with you about anything, either , okay?

A All right.

Q Now, it's okay to feel the way you feel about certain matters. There's no problem with that at all. It's okay to feel about different, controversial subjects the way that you feel about them. I'm not going to argue with you about that at all. In fact, I would defend your right to say what you want to say. Do you understand what I'm taking about?

A Yes.

Q Okay. Now, is this your first time ever to come down for jury duty?

A Yes, it is.

[1831] Q Okay. It's an experience and a half?

A Yes, it is.

Q Okay. Do you consider yourself basically a law and order person?

A Yes.

Q Do you feel as though you follow the law?

A Yes.

Q And that everyone should follow the law?

A Yes.

Q Okay, How much do you know about the judicial system?

A I guess not a lot.

Q You realize that everybody has a right to be tried by their peers?

A Yes.

Q Now, one thing that Mr. Nelson was harping on was your ability to take into consideration, under the proper set of facts and circumstances, and assess the minimum and also the maximum penalty in a murder case.

Q Okay. Now, no one is trying to get you to commit to anything. You realize, as **[1832]** he indicated, the minimum for murder is five years and the maximum is ninety-nine years, life and an option of a fine of $10,000,00. Our legislature set that range of punishment. The people down in Austin who make the laws, they set that range of punishment because you can have fifty million different fact circumstances that fall within that range of punishment, so they wanted to give people that particular range to work with when they're serving on a jury and when they're making a determination as to what the proper sentence should be. Do you understand that?

A Yes.

Q Okay. Now, I'm not asking you to commit one way or the other to saying that you would give somebody five years in the penitentiary. I'm not asking you to do that, but I'm asking you, if you felt as though you, if you felt as though the proper facts—number one, you found someone guilty of murder, okay—and circumstances existed in your mind, that

under those facts and circumstance that you would, number one, consider and, if you felt as though the circumstances and the **[1833]** facts called for it, assess penalty of five years. I'm not saying that you have to—again, this is your first time down here. There's fifty million circumstances and you don't have to think of one in your mind, okay?

A Yes.

Q And you know that's what the law is, five years to ninety-nine years or life. I'm asking you, could you consider, under the proper facts and circumstances, assessing a minimum of five years confinement?

A If I had to.

Q Okay. If that's what the facts called for?

A Yes.

Q Now, let's explore that a little bit more. You said if you had to. You don't have to do anything.

A Right. Well, when I said that, I was meaning as to what you added onto it, if the facts—

Q If you felt the facts called for it?

A If that's what it called for, yes.

Q I'm kind of misunderstanding you. **[1834]** You said if that's what it called for. What do you mean?

A Okay. When I said that, I was meaning as of what you tagged onto it, if that's what the facts brought about to it and this was it. Myself and my preference would prefer to have more, but I would consider it.

Q If you felt as though the facts called for it, you could assess it; is that correct?

A Yes, I could.

Q Now, what I want to make sure that you understand, no one is trying to commit to saying " I will give five years." "I'll give life." What we have to know—and there's some confusion as to whether you can consider the full range of punishment, from five years to life. In your mind, if you said these facts called for it, even though a person knowingly and intentionally took the life of someone else without any

legal justification such as self-defense or any legal excuse such as insanity, that he knowingly and intentionally took the life of someone, that I can consider the full range of punishment, for five years to life, **[1835]** and a $10,000.00 optional fine. I can consider it and, under the proper facts and circumstances in my mind, if I felt as though the facts warranted it or justified it, I could give that person five years?

A I could consider it.

Q And you could do it if you felt as though the person should receive five years; is that correct?

A If I felt that.

Q Okay. Understand something now. I'm not saying that you have to give it to a person. I'm saying, if you felt as though the facts and circumstances called for it, that you would give a person five years?

A I would consider it.

Q You said that you would consider it?

A Yes.

Q The law requires—and this is the law—that you not only be able to consider it but you would be able to do it, also, if you felt as thought the facts called for it, I'm not trying to get you to commit to it. I just want to make sure you have an open **[1836]** mind to it.

A Well, I think I could, but I wouldn't want to—well, I couldn't then.

Q I'm sorry?

A Well, if we don't have that difference, I would say I couldn't because I couldn't consider—

MR. NELSON: Did he say could not?

THE COURT: I don't know.

MR. RAND: Right.

A Because I could consider it. Now, whether I would like to or not, in my own opinion, I wouldn't want to. Is that what you're asking me?

Q You're saying that you wouldn't want to. I don't have any problems with that. I'm just saying, if you felt as though the facts and circumstances called for it in your mind—again, this is your first time down here and there's fifty million circumstances that could come up where a person knowingly and internationally took the life of someone else without and legal justification or legal excuse. I'm saying, you know, would you keep **[1837]** an open mind and, if you saw those facts and circumstances would you, not only consider it, but also assess the minimum of five years?

A Yes.

Q You can do that? Again, I'm not trying to tie you down to saying you're going to give somebody five years, okay?

A Yes.

Q I'm not trying to tie you down to saying you'll give somebody life, either, but I want you to be able to, if you can, and you said that you could, consider the full range, from five years to life, and, if the facts and circumstances, in your mind, called for it, be able to assess the minimum of five years, which you said that you could, or assess the maximum of life, which you have to call it like you see it. Do you understand what I'm talking about?

A Yes.

Q Can you do that?

A Yes, I could.

Q All right. Now, let me ask you this—Mr. Nelson basically asked you the same question. Was there some communication problem that you didn't understand what he was saying **[1838]** or what?

A Well, maybe what I was understanding from him was—they way I took it was what would I do. Okay, Your question was, could I consider or be able to. Yes, I could. Under his consideration, I would want more, but I could consider and give five years if I had to.

Q If you felt it was—

A Well, If that was that was adjustable.

Q I'm sorry?

A If that's what was adjustable under the facts and circumstances.

Q Yeah, that's all I'm saying. You know you may very well want to—let's get off that for a second. I see that you—what school did you graduate from?

A Skyline.

Q What particular cluster were you in?

A I came out of plastic technology. The first three years I was in automotive.

Q I was noticing some of the literature that you've read that dealt with **[1839]** automobiles. Again, would this be a fair statement, that people should obey the laws as handed down by our legislature?

A They should.

Q Okay. Would it be a fair statement to say that everyone should, in fact, try to be involved in voting and the jury system and the criminal justice system, also? People should try to be involved in civic affairs is basically what I'm saying.

A If they prefer to.

Q Okay. Now, what are your thoughts about the criminal justice—have you ever just thought about the condition of the criminal justice system?

A No, I haven't.

Q I'm sorry?

A No, not just serious thought.

Q What are some thoughts that you've had about the criminal justice system?

A Well, possibly say a crime of maybe just robbery and then a separate crime of, say, murder. Why could, maybe, the guy that murdered somebody go to jail for five or six years and that's it and maybe a guy that **[1840]** steals something from a Seven-Eleven has to go for fifteen.

Q So unequal justice?

A Yeah. You know, it sounds kind of funny.

Q What doesn't sound—

A Me, myself, being on the outside; I'm looking at what is there on the paper in the news. I don't know the facts or anything, really, behind it, but all I see is, okay, this man got fifteen years for robbing a Seven-Eleven and this guy got five for a killing.

Q Do you understand that there are probably a lot variables that you and don't know about?

A Yes. That's what I'm saying. I don't know all of the background to it.

Q Exactly, because there may be one situation where a person gets five years for robbery and a person gets fifteen years for murder?

A Yes.

Q And it's a plea bargain as opposed to a jury trial or a trial before the Court, There are a lot of variables involved; **[1841]** do you understand?

A Yes.

Q It gets basically back to what I was talking about. There's a wide range of punishment open for various types offenses. Did you know that aggravated robbery was a first degree felony offense and that the minimum you could get was five years just like in a murder case?

A I didn't.

Q Okay. Did you know that burglary of a home is a first degree felony just like murder, just like aggravated robbery and the minimum you could get is five years and the maximum you could get is ninety-nine year or life and an option of a fine of $10,000.00.

A No, I didn't.

Q There are numerous other first degree felonies, also. Now, the only thing that the law requires, in order for you to serve on this jury, is you be able to consider the full range of punishment, that being from five years to ninety-

nine to life, and, under the appropriate facts and circumstances, in your mind, if the facts called for it and you [1842] feel as though it's justified, be able to assess the minimum of five years and, if the facts called for life, be able to assess life. Can you do that?

A (No response.)

Q Again, this is an individual thing, being able to consider it and, if you believe in your heart that the facts call for it, be able to give five years. I believe you indicated earlier that you could.

A Yes, I could.

Q Can you do that sir?

A Yes, I could.

Q Now, you're telling Mr. Cunningham and myself, as Mr. Miller-El's attorneys, that you could consider and assess five years if you believed in your heart that the facts called for it?

A Yes.

Q Now, do you understand what Mr. Nelson and I were talking about concerning the minimum sentence of five years?

A Yes, sir.

Q Do you have a full understanding of it?

[1843] A Yes.

Q And basically the full range of punishment?

A Yes.

Q Mr. Rand, I believe you're qualified to serve on this jury. Thank you, very much,

MR. WEST: I'll pass the juror.

THE COURT: I'll hold that the juror is qualified on your submission, Mr. Nelson. You still have about a minute left on your record of time.

[1844] EXAMINATION

BY MR. NELSON:

Q Mr. Rand, again, the last thing I want to do is argue with you myself, but you realize that you told me one thing and told Mr. West something else and I guess there is some confusion there and I don't want you to be confused. You kept going back to if it was up to you or what you would do. I think words were used, you know, what would I do. I thought you told me that, if you were making the decision, you would want either life or death for this type of offense; is that right?

A Yes, but the way he questioned me, I could consider five.

Q Okay. What we're talking about, if you're on a jury and you're sitting over there on the jury and you hear the facts and it's been proved to you beyond and reasonable doubt that this defendant knowingly or intentionally took the life of another human being, killed them, knew he was going to do it and did it without any legal justification or excuse whatsoever—it's easier to talk in the abstract. We're talking about a guy who has [1845] been found guilty of killing another human being and you're sitting on that jury. We're just asking you to be as honest about it as you possibly can be. I know that's what you're been trying to do, but being just as honest about it as you can with us and with yourself; could you really consider and assess a five-year sentence under any circumstances?

MR. CUNNINGHAM: Your honor, we'll object to that as an improper question in that, if he felt that the proper sentence was five years.

THE COURT: Do you understand that, Mr. Rand?

MR. RAND: Uh-huh.

THE COURT: Go ahead and answer the question.

A Okay, I could consider it.

Q If you were sitting as one of the jurors in that box, could you sign your name saying, "I'm not just thinking about it. I'm going to give this guy five years. He killed somebody. He knew he was going to do it. He did it, but I'm going to give him five years."?

[1846] MR. WEST: Your Honor, again, that's an improper question. If the facts and circumstances call for it and he believed in his heart that the person should get five years. Improper question.

THE COURT: Ask the question, Mr. Nelson, one more time. Your time is up though, but go ahead and ask it one more time.

Q Mr. Rand, again, I'm just trying to find out what you really feel, down inside what you really feel okay. You've convicted somebody of murder, not voluntary manslaughter, not self-defense, no accident. You've convicted them of murder, knowingly or intentionally causing the death of another human being and you've found them guilty beyond a reasonable doubt and you're sitting on the jury. You've heard all the facts and circumstances. You know everything you're going to know. You've said, in a proper case, you could consider five years, but you also kept saying that, if it were up to you, in [1847] your heart, you would want to give more. Am I right about that?

A Yes.

Q Okay, so even if the facts and circumstances justified it where you could consider it, being real honest about it, could you give it?

A Yes, I could.

Q Is there any question about that, because you've changed from what you told me before?

A No—well, I don't know. From the first time you asked me to now, if maybe the way you said it or my understanding was different, but I could consider it and, if shown, yes. But under the same token, I would think that I would want more. If it was proven, then okay, he gets 99 years. I would go that way, also.

Q You understand that nobody is going to prove to you—

MR. WEST: Excuse me. Your Honor, I think the state's time is up. We keep going over it. He's already said that he could [1848] consider it and, under the proper facts and circumstances, he could do it. The State is asking for additional time and the Court has already told him that his time was up. I thought he had already asked his one question and now he's going to something else.

THE COURT: Mr. Nelson, bring it to a close.

MR. NELSON: I'm trying to, Judge, but he said something else in the same area that I want—

THE COURT: I think probably the lawyers could be here all afternoon the way we're going.

MR. NELSON: Is the Court stopping me at this point?

THE COURT: Go ahead and ask one more question.

Q I've forgotten exactly the words you used now, Mr. Rand, but you're telling us—well, you said if it was proven to you that he had to get ninety-nine years—I think the words you used were something to that [1849] affect—or it was proved to you that he had to get five years—

A That it was adjustable on that case.

Q You understand that it is always going to be your decision? It's up to you. Nobody is going to prove to you that anybody has to get five years and, if you couldn't consider and assess five years in a proper case, then that's fine. Nobody is going to get down on you for being a bad citizen or anything else because you can't. We just need to know.

A I could consider it, but I couldn't sit here and say that I would give it to him. Is that what you're asking?

Q Well, we can't commit you right now to saying that you would do it.

A I could consider it but I couldn't say whether I would give it to him.

Q The law says consider and assess. Okay. Not only consider, but you have to be able to tell us that you could give it.

A Yes, I could.

Q You're saying that you could?

MR. WEST: He's already **[1850]** answered the question two times, Your Honor.

THE COURT: Well, he's through now. Mr. Rand, the only question I want to ask—and you're probably tired of these lawyers asking you questions, but let me sum it up to make sure that I understand. The law says that everyone of these twelve jurors who are going to be sworn in this case has to have an open mind to the entire range of punishment that might be provided for in this particular case. Now earlier on—and we're not even arguing about this—you told the State that, in a capital murder case, if they proved those questions to your satisfaction beyond a reasonable doubt, you could answer them yes. We're not talking about that. We're talking about a case where you, as one of the twelve jurors, has found a **[1851]** Defendant guilty of the offense of murder, which is the intentional or knowing or both causing the death of some individual by some manner or means. The punishment range for that offense of murder, under our law—it applies in all murder cases and not just this one, but in any murder case—is a prison sentence of not less than five nor more that ninety-nine years or by a life sentence. I don't know if the lawyers mentioned it or not, but there is also an optional fine of up to $10,000.00, if the jury wants to fine in addition to a prison sentence.

Now, what the law say is each juror who is seated must be able to set a punishment somewhere within that range depending on what the facts and circumstances of that particular case tell you, as an individual juror and then **[1852]** you working together with the other eleven jurors, is a proper punishment in the case. Now, what the lawyers are asking you is, and it was asked several different ways at several different times—now, let me qualify my question by telling you some of the things the lawyers said.

You don't have to imagine a case it would take for you to assess any particular punishment. In other words you don't have to be able to tell me, well, I could give ninety-nine years if it involved killing a baby or something like that or I could give five for this or that. In fact, the law wouldn't even

let you do that because that means in my mind and, I think, in the law's mind that would be the only case in which you could do that particular thing. The law doesn't require you to imagine the facts **[1853]** it would take you, in your mind, to vote for some particular punishment. The law does say that you have to have an open to the entire range of punishment so, if you heard a set of facts in a murder case, after hearing all those facts and those circumstances, having found the Defendant guilty of the offense of murder—and we talked about what that was, but you found him guilty of murder—if the facts and circumstances presented themselves to you and in that particular case you thought a proper punishment was a five year sentence, which is the minimum sentence, you could and would vote to assess that as the punishment in that case. Now, the question to you is, in a proper case, if the facts and circumstances warranted it in your mind, could you and would you vote to assess a five-year sentence?

[1854] MR RAND: Yes, I think I could keep an open mind.

THE COURT: Can you give me a yes, I would—

MR. RAND: Yes.

THE COURT: —or a no, I wouldn't?

MR. RAND: Yes.

THE COURT: I'll hold that he's qualified, Mr. Nelson. What says the State?

MR. NELSON: At this time, Your Honor, the State would exercise a preemptory challenge.

MR WEST: Your Honor, I want the record to clearly reflect that—

MR. NELSON: Could we take this up outside—

MR. WEST: Judge, I think it should be taken up in front of Mr. Rand's face.

THE COURT: Well, I'll let it be done at this time.

MR. WEST: I want the record **[1855]** to clearly reflect that Mr. Rand is a black male and he's twenty-three years of age.

THE COURT: Mr. Rand, thank you for your patience with us, first of all. You will be excused for service in this case. If you would leave your badge with the bailiff as you go out—this is off the record, Pam.

(Whereupon, an off-the-record discussion was held after which the following proceedings were held.)

MR. NELSON: The State exercised its preemptory challenge because Mr. Rand was ambivalent about the death penalty and at the first of the voir dire, his ability to serve on a jury like this and he stated himself that he wasn't sure whether he fitted in category one where he could serve on the jury or category two where he could not. That was the **[1856]** State's concern for exercising a preemptory challenge in this case.

THE COURT: Let's take a short recess so I can make a phone call I should have made two hours ago.

Mr. MACALUSO: Judge, If I may say something. I realize that everyone has the right to make a legal objection, I guess, at the time. I didn't really actually keep count this last time, but if there were ten objections over this very limited area, ten nonlegal objections, to questions—and I miscount—all I'm asking, Judge, is, if we stand up and make nonlegal objections, the Court call it to our attention, as I've asked the Court to do with the other lawyers in this case, if we're ever going to get a jury in this case.

MR. CUNNINGHAM: Your Honor, the only reply we would make to

* * * *

[2000] CARROL S. BOGGESS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. I'm trying to crank up on time here this morning and get my voice going here. Ma'am, let me be-

gin by reintroducing most of the people who will be involved in this case. We were introduced to you the other day. My name is Paul Macaluso and the man that just walked out, who will be seated right next to me in just a moment, his name is Jim Nelson. Once the trial begins, we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas. He's designated us as the lawyers to represent the State in this case.

Now, the gentleman that I'm pointing to at this moment is Mr. E. Brice Cunningham.

[2001] MR. CUNNINGHAM: Good morning. How are you?

Q I imagine in not too long he will be joined by Royce West. He will be seated between the Defendant and Mr. Cunningham. Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is seated to your very far right. You can see him, I think, if you lean forward. He's in the powder blue suit there. His name is Thomas Joe Miller-El. He is charged with capital murder and he's the Defendant. Now, the reason why I've taken—that's Mr. Nelson.

MR. NELSON: Hi.

Q The reason why I've taken the time to reintroduce every one here is to let you hear our names again and then reacquaint you with the roles that we all play in this case so you know what we do or are supposed to do. I would just like to ask you if you know or recognize any one of us?

A From yesterday.

Q Other than from yesterday?

A No.

[2002] Q I know your husband works in the district clerk's office. I think I know—

A I'm sure you know him. He's been here a while.

Q He's been around for quite a while, hasn't he?

A Yes.

Q I don't think that we have ever met. I don't recall having met you, but I see Joe here all the time. As you will know, Ms. Boggess, you are a prospective juror on this capital murder case. As I'm sure you know at this time, capital murder is a very, very serious offense. In fact it is the most serious offense under the laws of this state, as you well know, serious because of the nature of the offense. Obviously it involves a capital murder. Equally as serious, I suppose, because of the two possible penalties for a person who is convicted of capital murder. You know if a person like Thomas Joe Miller-El is convicted of capital murder, then he can receive only one of two possible penalties. One is a sentence of death by lethal injection **[2003]** in his arm or a sentence of life in the Texas Department of Corrections.

You can see obviously how serious everything is connected with this type of case. Probably because of that, Ms. Boggess, the law allows us to talk to you individually as we're doing now. Have you ever been down here on jury duty before?

A Uh-huh. I don't remember the year. I think it was a couple of years ago.

Q It was a civil case, do you think?

A Uh-huh.

Q If you were talked to by the lawyers as I'm pretty sure you would have been, you were probably talked to when you sat out there in the gallery, weren't you, and you were asked questions and you answered up in front of everybody else. That's fine for most cases because most cases don't involve the death penalty and how you feel about the capital punishment laws and the death penalty statute and so forth and so on. The law allows us to talk to you individually, kind of semi-privately, like we're doing now because they want you to relax as much as you can. Are you **[2004]** a little bit nervous?

A No, not really.

Q Well, there is no need to be nervous because nothing you can say will be wrong. For that matter, it won't be right, just as long as you tell us how you feel. No one is going to quibble with you or quarrel with you, argue with you, try and talk you into anything or out of anything. You are the most important person here in this room right now and your opinion is the most important opinion. So whatever is on your mind, I don't care what it is, if it affects your service as a juror, you just tell us, all right, and you will be doing your job. If we ask the right questions, we'll be doing our job. Fair enough?

A Uh-huh.

Q Now, if you have a questions about anything, Ms. Boggess, by all means ask it because, you know, when you get on the jury you can't ask questions ordinarily of the witnesses and the lawyers and so forth. If there is anything that you need to tell us, whether we touch on it or not, by all means let us know, all right, just in fairness to both sides.

[2005] Now, in fairness to both sides, let me tell you what our position is just from the very beginning. Ms. Boggess, we are actively seeking—that is, the State is actively seeking the death penalty in this case for that man right down there. It's only fair that we tell you right from the very beginning what our position is and what we intend to be able to prove and establish once the trial itself begins and then, of, course, what would be expected of the jury on the basis of that evidence. We are actively seeking the death penalty. That is, we intend to provide this jury with the type and the qualify of evidence—and that would mean you if you were on this jury—that would convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-El was guilty of capital murder just exactly as he is charged.

Then in the second phase of the trial, once again, to be able to provide that jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions that the judge will give the jury at the end of the **[2006]** trial should be an-

swered yes. All yes answers, as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-El to betaken some day down to Huntsville, Texas and at an appointed time—the law designates the appointed time—he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance injected into his body to cause his death as the law requires under those situations.

I'm not trying to make this sound real gory or gruesome, other than the fact, ma'am, that it is only fair to you and every other juror—we've talked to about forty so far—to let you know exactly what the stakes. are in this type of a case. I think you know anyway, but it wouldn't be fair to you to lull you into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately.

I think, as you well know, Ms. Boggess—you're thirty-seven years old and you know the difference between fact and fantasy or something you hear on TV or read **[2007]** about and then something when you're caught up right in the midst of it. Do you see what I'm getting at?

A Yes.

Q It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done and frequently—I know. I'm forty-three years old myself. I know that it is quite a different situation frequently when you're actually called upon to do something yourself. Do you see what I'm getting at?

A Yes.

Q That's what we want to know and that's why we're talking to you as intensively as we are. The reason I say that is this: You were asked about your feelings about the death penalty and whether or not you could actually serve in this type of case. As you well know, a lot of people have real strong feelings one way or the other about the death penalty, strong feelings one way or the other about whether or not they can actually serve on this kind of a jury because of

their personal or conscientious feelings or religious or moral **[2008]** feelings one way or the other.

Now, I've done a lot of talking here so far as an introduction. Really what every one wants to hear is what you think and how you feel. I know you were asked this question yesterday and were given those three lines there to respond and very little time to really think about it, but could you share with us, Ms. Boggess, now that you've had a night to sleep on it, to think about it, what your feelings are really about the death penalty and whether or not you can actually serve on this type of case?

A Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it. My feelings about the death penalty are just as I said, if I believed that a person truly had committed a murder, a premeditated murder or a murder—you know, intended to do something like that, then I would feel that it was my duty to judge that **[2009]** person and to decide whether or not that person, you know—

Q I gather from what you're saying you feel strongly, obviously, about murder?

A Yes.

Q That a person ought to be held accountable for a murder type offense?

A Right, or punished for any type of crime that they commit.

Q I notice you put down here on your questionnaire, "Do you believe in the death penalty?", "Yes—only in cases of premeditated murder." I think you went on to qualify it by saying for an intentional murder?

A Right. I wouldn't want—you know, like the Judge talked about, self-defense or an accidental thing or something like that. I certainly wouldn't want to judge a person on that.

Q We'll talk about that in some detail in just a second, but you understand that a person can only receive the death penalty in Texas for a capital murder. Acapital murder involves a murder itself. That's a component of capital murder. It's **[2010]** what we call regular murder—actually it's not called regular murder. It's just referred to as murder.

Murder itself is not a capital offense. In other words, you can't receive the death penalty for what we call regular murder. For example, if I kill Mr. Nelson and just kill him for whatever reason I have for killing him, I cannot receive the death penalty for his murder no matter how violent or brutal or vicious it may have been unless he falls under a particular category. For example, if he is a police officer and I murder him and I know he is a police officer, he's on duty, I can receive the death penalty for that kind of a murder. But if it is just Jim Nelson, the district attorney, I can't do that. I can't receive the death penalty because that's a regular murder. If I killed you or you killed me, you see, that's regular murder. That's altogether different in the range of penalty. If you kill a jail guard or a fireman, mass murders, you see, murder for hire, those are capital murders. Otherwise, murder itself is a noncapital offence. Murder is a situation **[2011]** where one person knowingly or intentionally causes the death of another. You have to understand that that does involve a knowing and/or an intentional killing. I knew I was going to kill him. I intended to kill him. I killed him. Do you see?

Now, what the Judge said about insanity, self-defense, accident or a crime of passion, if you're on a jury and someone is charged with murder, but you believe or you have a reasonable doubt that someone killed as the result of insanity, self-defense, accident or a crime of passion—we'll talk a little bit more about in detail later—then you, don't make it a lower sentence, you see, because if you believe that it is one of those four things, it's not murder, you see, because those are legal defenses or legal justifications for somebody killing somebody else. Do you see what I'm getting at?

A Uh-huh.

Q If you believe that I killed Mr. Nelson because I thought Mr. Nelson was going to kill me or he came at me with a knife and I got my gun first and shot him, you see, then **[2012]** you don't give me a lower sentence because you thought I acted in self-defense. You find me not guilty just like I would have to find you not guilty if that were the situation and I were on the jury. Am I making myself clear?

A I suppose, but let me go back and say this: I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence; is that correct?

Q Uh-huh.

A I'm trying to figure out why you've explained all that to me. I understood that, but what I'm saying is, it's not the jury's—it's not my decision to say whether or not he gets the murder penalty or not because that's already been established. The fact is, is he guilty of the crime or not, is that not what the jury is—

Q Well, that's partially correct and then it's a little bit confusing because this is a fairly complex area of the law. Let's talk a little bit about that. You understand that in any criminal trial—you see, any criminal trial is conducted in two parts, **[2013]** whether it be capital murder or shoplifting. The first part deals only with whether or not a person is guilty or not guilty. In other words, if the State has accused somebody of capital murder or if the State accuses somebody of shoplifting, the State has the burden of proof in all cases. We have to convince you that the person is guilty of capital murder or shoplifting, whatever the case may be. That's the only decision the jury makes.

Let's say if you find him not guilty, obviously, the trial is over. If you find the person guilty of capital murder, then we go on to the second phase of the trial where the penalty is determined. There is nothing automatic about somebody being given the death penalty just because they are convicted of capital murder. It's not automatic. There's an option there based on the answers to questions.

Now, years ago, up until about thirteen years ago, jurors, after they convicted someone of capital murder, would listen to whatever evidence may be presented in the second phase of the trial—although there **[2014]** is no obligation for either side to present any more. You may have to make a decision just on what you learned about the offense itself. After the jurors heard the evidence in the first part of the trial, heard all of the evidence, they would go back and actually decide for themselves did the person get the death penalty or should they get a life sentence or should they get some number of years. It's like in the movies. You know, you've seen those movies where the jury comes back and they say, well, we think he ought to hang for that or he ought to get the electric chair, whatever it was, and they actually voted for that. If all of them agreed it should be death, they all gave death.

Let me ask you, do you feel you're the type of person who could make that kind of decision directly?

A I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure.

Q Well, that's the reason why we spend the length of time with you now because, **[2015]** you know, we have to rely—everyone here has to rely on your service as a juror on what you tell us now. There will be times when I talk to, you, Ms. Boggess, where you're—you're going to answer questions probably in the same way I would and everyone elsehere would if we were in your shoes. I think so. Maybe. I don't know. You understand how important your answers are to everybody here. I don't want to make it sound like I'm putting any pressure on you, but the law does require that we kind of pin you down on some things, simply because the law requires it.

A I understand.

Q You see, if you say I think so, that means you may or you may not. Neither side can make a decision here and neither can the Judge on an answer like that, even though

it's very human for you to answer that way. Do you see what I'm getting at?

A Yes.

Q One of the reasons I mention that is, in question fifty-eight it says here, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a **[2016]** verdict which would ultimately result in the execution of another human being?" and you said, yes or you circles yes here. Could you talk a little bit about that?

A Well, I guess what I meant by that is, I do have difficulty—I've never been in a situation like this before, like I said. I believe that the bible states—and I am a Christian and I believe that the bible states that, if someone commits a crime or commits a sin or whatever you want to call it, there is a punishment and it is up to the people that love that person, the Christians or whatever, to punish that person for that particular crime because God will punish him and I believe he puts us down here to do that same thing. That's what I meant, but now whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that.

Q Okay. You're not the first person to have voiced that opinion. That's why this is as tedious as it is and takes as long as it does because actually nobody wishes to put you **[2017]** or anybody else, Ms. Boggess, on a jury or in a position to have to do something—let's say to follow their oath as a juror, if they accept that oath—that is going to violate their conscience or their personal feelings that they've held for a long time if that's the situation. Do you see what I'm getting at?

We're not trying to make somebody do something against their conscience. It's just that simple. Sure the law does expect you, as a citizen of this community, to serve on a jury if you can. The law does not expect you, me, these other lawyers or anybody else to serve on a jury or do anything in violation of their conscience.

Now, there is a big difference, as we all know, between a decision that may be difficult because certainly on a death penalty case, it would be difficult for anybody, I suppose. I'm sure it's not going to be an easy decision for anybody. For some people and, in fact, a lot of people, it's more than just a difficult decision. It's a decision that would cause them, because of the enormity or the magnitude of the situation, you know, being a **[2018]** part of someone else being executed, they simply feel that would be a violation of their longstanding personal feelings and conscientious beliefs. Do you see what I'm getting at?

A Yes.

Q That's why the Judge told you that the oath the jurors take is an option. You have the opportunity, you or me or anybody, or the option of taking the oath or not taking the oath. It really is—I like the way the Judge put it. He said it was kind of like a job or a job description. When you go and you interview for a job, you find out what all is involved because you want to know what is going to be expected of you once you sign on. Obviously, you're not under any obligation to sign on ordinarily for a new job until—you know, you want to know what it entails and what it involves and what you're expected to do and then whether or not you can do it or you want to do it. Do you see?

Now, that is kind of like this situation. If you're on this jury, for example or anybody is on a jury, you know that the **[2019]** result of three yes answers to these questions, if the State proves to you or anybody that these three questions should be answered yes, this Judge, I guarantee you, will sentence this Defendant to die. The Judge has no option. I know that the Judge is not going to get mad at me when I say this, Ms. Boggess. He has really little to do with the decision as to life or death. In fact, he has virtually nothing to do except to carry out the will of the jury on the basis of those three answers. You see, three yes answers equals death. Although you don't write death in there like you used to, you might as well. Yes, yes, yes, equals death because the Judge can't change the verdict. Do you see what I'm getting

at? If a person is on a jury that last yes equals death. Do you see what I'm getting at?

Now, that's part of the job description and ultimately it boils down to whether or not you feel like you could serve on this jury and participate in the execution of another human being, that it was something that would both your personal conscience or your personal beliefs. If it doesn't, then you **[2020]** would probably be qualified to serve. If it does, then there is no requirement that you take the oath. Do you see what I'm getting at?

A Yes.

Q Now, let me back up for just a second. Maybe this might be helpful to us in discussing this. I hate to do this because it puts people in categories and I know it's hard to do sometimes and probably unfair, but it serves a purpose, I think.

When it comes to death penalty juries and capital punishment, people may be divided into four categories. In no particular order. I'm sure you know, before I go any farther, that rather a person serves on this type of a jury or a person doesn't serve, that doesn't make you a good citizen or a bad citizen because, if it were that way, then we would have about thirty-nine people that were bad citizens. We have only two jurors. We've talked to forty people. Do you see what I'm getting at?

A Yes.

Q You understand that. You don't get any points for serving on this kind of a **[2021]** jury or any demerits if you don't.

The first category of individual let's say is a person who believes in the death penalty, they believe it is a deterrent to crime or it's necessary for whatever reasons and furthermore, if they had to, they could serve on this jury and they could render a decision that would result in Mr. Miller-El's death. It wouldn't violate their conscience.

The second group says, well, I believe in it and I think we probably need it or it serves some purpose, but because

of my personal beliefs or my conscientious beliefs, my religious or my moral beliefs, I'm just not suited to serve on this kind of a jury. I could serve on a noncapital case, a burglary or a robbery or a murder that didn't involve the death penalty, but I'm just not suited for this type of a case.

Let's say there is a third category that say, I don't believe in it, the death penalty, but if it's the law, I guess my feelings aren't that strong and I guess I could serve on it.

Or a fourth category that says, I **[2022]** don't believe in the death penalty and my feelings are so strong that I could never return a verdict that would result in anyone being executed. No way.

Now, I know these are general categories, but do you see yourself falling into one of those four?

A Yes.

Q Which one is that?

A I probably would pick the first one.

Q You do believe in the death penalty?

A Yes.

Q And you say you could serve on the jury?

A Yes.

Q Even though it meant that it might be a tough decision?

A Yes.

Q Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?

A Yes.

[2023] Q So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?

A Yes.

Q Is there any doubt in your mind about that at all?

A I could always tell the truth.

Q That's all you're expected to do. We have to come forth with the evidence to satisfy you beyond a reasonable doubt and, if we do, you answer the questions yes. If we don't, you answer the questions no. You know that the result of one or more no answers is a life sentence and those are the three questions that the Judge talked about yesterday that decide life or death.

Now, let me just cover one thing with you. You understand that in the old days, under the old law, the jurors decided on a personal basis. If you heard a fact situation, ,you heard about a defendant and a crime that made you mad enough, I guess, or caused you to feel that way, you would actually vote for **[2024]** death or life, if you didn't feel that way, or some number of years. Do you see what I'm getting at? It's a very personal decision.

We know that being on a jury, even though you don't make that decision directly, instead you answer the questions, you know that the result is the same, don't you? It could be death or life depending upon the answers?

A Yes.

Q The law expects you to put aside your feelings, your personal feelings, one way or the other and not let them influence your decision. Am I making myself clear?

A Uh-huh.

Q We all know, however, that we're obviously not robots. If I were on a jury, I might have a personal feeling. I might say, well, after I heard the evidence, or you might say, I think this guy ought to die for what he did. I'm not talking about Mr. Miller-El. Let's just talk about an example. You know, you might say, for what he did, I think this guy ought to be boiled in oil, if it were up to me. In any case, I think he ought to die, but when it comes time to answering these three **[2025]** questions, let's say you look at them in all honesty and find out that we have not satisfied you that one or more of the questions should be answered yes. In which case, you know, your oath as a juror would require you to answer the question no. Could you do that, go ahead and an-

swer the question no knowing that it would result in a life sentence and not the death sentence that you personally desire? Do you see what I'm getting at?

A Yeah. I could answer the questions on the basis of the truth, the facts that I felt like were the truth.

Q You see, the flip side of that coin, don't you?

A Yes.

Q Let's say you're on a jury and you say, well, this may be capital murder, but I don't think the guy—you know, if I could vote directly, I don't think the guy should die?

A Yes.

Q But I look at those questions and, yeah, they proved to me that he did it deliberately. Yeah, that's true. I can answer **[2026]** that yes. I think he probably would commit some criminal act of violence, so I can answer that one yes. And three, I believe it was unprovoked. Do you see what I'm getting at? Three yes answers in that situation would equal death. Could you put aside your personal feelings for a life sentence and answer those three questions yes knowing that it would result in the execution of that Defendant which would be contrary to your personal desire?

A I still back and say, regardless of my feelings, I would hope that I would not judge him by how I felt personally, that I would judge him by what facts I heard.

Q That's what the law would expect.. Let's shift gears here for just a second and let's talk about a situation that I'm not saying would ever come up, but we have to discuss it at this time. You know capital murder, the type of capital murder that we've alleged in this indictment, as the Judge referred to it and as we call it also, it's murder plus. We have the murder, the knowing or intentional killing of another human being, but no legal excuse or justification. It's **[2027]** couple with another very serious offense, another felony offense, murder during a robbery, for example, as alleged here. Okay. That's one type of capital murder.

I gather from what you told us, because that's what the law is, that's the type of capital murder you believe the

death penalty could be called for depending on the facts and circumstances?

A Right.

Q The other type is murder during a burglary, murder during a rape, murder during arson or murder during a kidnapping, murder plus. Do you understand that murder itself is not a capital offense. But when you commit murder during a robbery, then it goes up to capital murder. Do you see what I'm getting at?

A Yes.

Q Now, let's say that you're on a jury. Just imagine for a second that you're on a capital murder jury. The State has alleged murder during a burglary, a capital murder. We proved the murder. There's no doubt about it. You don't have any doubt that the Defendant **[2028]** killed somebody with no legal excuse and no justification for it under the law at all. It was knowing and intentional, but you didn't hear any testimony about a burglary. Do you understand, if that were the situation, if that situation occurred, you could not convict that individual of capital murder for the very simple and obvious reason that we didn't prove capital murder. What did we prove?

A Just regular murder.

Q You got it. That's right. When you find him not guilty of capital murder because we didn't prove that and find him guilty of what we did prove, which was what? You said murder. Well, if that were to happen, you forget all about the automatic life or death, you see. Those are no longer options for regular murder. The range of penalty for murder is very, very broad under the laws of the State of Texas.

I want to go back to what we were talking about earlier. That is where we're talking about the murder offense. You talk about the range of penalty for murder, not capital murder, but regular murder, then you **[2029]** must exclude from your thinking a homicide, in other words a killing, where one person kills another person knowingly or intentionally, you

must exclude what I said earlier, self-defense. When you think about murder and the range of penalty, high or low or somewhere in between, you must exclude self-defense because, as I said earlier, if you believe someone killed somebody in self-defense, they've got a right to do that. You have to find someone like that no guilty.

What I'm saying is, I don't want you to be thinking, well, I can give X number of years lower because someone killed in self-defense. If you think someone killed knowingly or intentionally in self-defense, you have to find them not guilty. The same thing would hold true if you thought it was an accident. That's not a lower penalty. That's not guilty. I mean, if the gun went off accidentally, you don't give someone a lower sentence. You find them not guilty.

If you believed someone was insane at the time that they knowingly or intentionally killed somebody, well, that's not **[2030]** murder either. You find them not guilty. Am I making myself clear?

A Yes.

Q Or if you found, for example, that somebody killed someone in the heat of sudden passion. For example, somebody comes home and finds out that their child had been sexually molested by a neighbor. The neighbor is up the street and he is laughing about it. The father flies off the handle, goes into a rage, picks up his gun, goes up the street and kills the neighbor. Well, the law doesn't excuse that, but it doesn't call it murder, either. It's less than murder. It's called voluntary manslaughter, so don't be thinking about that. That's not within the range of penalty. Am I making myself clear?

A Yeah.

Q Now, having set that stage—and I'm just asking you for your personal opinion, all right? If you believe one person knew he was going to kill somebody, intended to kill, somebody and did it, no insanity, no accident, no self-defense and no heat of passion, what do you think the minimum

ought to be, Ms. Boggess, **[2031]** for that sort of an offense, for that kind of murder, a knowing and intentional murder?

A I don't have any problem with what I think. It's what I believe and I believe that the bible says that person should be put to death. That's in Romans and that's my belief. Whether I want to be the one to decide that is—

Q In other words, in your personal feelings it should be death for knowing and intentional murder; is that correct?

A Right.

Q Let me ask you, ma'am, in that regard, knowing that the range of penalty is from five years to ninety-nine years or life for murder—that's what the law sets out—could you ever—would you ever feel it was proper—could you ever hear any facts or circumstances where you personally would feel it would be proper to assess a sentence as low as five years for a knowing and intentional murder—

MR. CUNNINGHAM: Your Honor, she—go ahead.

Q I think I'm finished.

[2032] MR. CUNNINGHAM: Your Honor, we would object to the form of the question because it fails to include if she heard the facts and circumstances of that case and she believed that the facts and circumstances called for five years.

THE COURT: Go ahead and ask the question.

MR. CUNNINGHAM: And, Your Honor, I think she should be told what the range of punishment is.

MR. MACALUSO: I think I just did, Your Honor. If I'm not mistaken I did say it was five years to ninety-nine years or life, didn't I?

Q That's what the law says, that the range of penalty for murder is five years to ninety-nine years or life. The law expects a juror, if he can. [sic] to tailor the punishment somewhere in between there. Let me just as you, do you personally feel—you know, that's why you're here. we're asking you.

[2033] A Let me explain something.

Q Sure.

A You know, my feelings about the law and my feelings about what the bible says about what the law does. I feel that, you know, the bible says that I should be under the government, the rule of the government. However, it says also to me that the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically. I'm having difficulty with the fact that what the law decides is not biblical principle, but yet I'm still under the law. Not that I'm going to break the law, but I don't want to be a part of that particular—I don't want to go with the law just because it's the law, just because you say he should get five to ninety-nine or he should get death, because of this or the other, when the bible says, no, that's not the way I want it. Do you understand what I'm saying?

Q I think I understand what you're saying. You said personally you would vote for death. You think a person ought to receive the **[2034]** death penalty for that; is that correct?

A I'm saying that my personal beliefs, because I'm a Christian, says that, if someone commits a murder, then that's what the bible says. Whether or not the law says it, you know, is something different because—you've decided what you're going to do. You know what I'm saying? The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right.

Q That's why we're going through and asking you all these questions. I'm out of time right now. The Judge has very graciously allotted us a specific amount of time, but I just want to ask you this last question. It's kind of a difficult question to ask.

Knowing yourself and knowing how you feel in your heart and in your mind and spiritually, for that matter, do you feel, ma'am, that there would ever be any facts and circumstances where you feel it would ever be proper or justified, that you could ever under any facts and circumstances, feel that a five year sentence, you could ever consider and actually vote for a sentence as low as five **[2035]** years, for the knowing and intentional taking of another human life without any legal excuse or any legal justification whatsoever? Do you :ever feel it would be proper under any circumstances to vote for that sort of a low sentence?

A That's tough. I may—

Q You know, we have to pin you down on that. I know you haven't heard any facts. We can only go as far as we have. You've just got to search your heart and your mind. Just tell us how you feel. Do you feel you could ever—you would ever feel it proper under any facts and circumstances where you would be able to vote for as low as five years in the Texas Department of Corrections where one person knowingly and intentionally killed somebody, commits murder, without any legal excuse or any legal justification whatsoever regardless of the facts?

A I'd have to say yeah. I'd have to say that I may do that. It just depends on where my heart was and how my faith—and what I had prayed about and how God had answered my prayers. You know, even though He says death **[2036]** sentence for everything, the Lord does do different things at different times. He doesn't always kill everybody just because someone else kills them, so I couldn't say that.

Q Again, I regret this, but I'm going to have to pin you down at this point. It's either yes, you feel you could or you could not.

A I feel I could.

Q Do you have any questions at all of me, Ms. Boggess?

A No.

Q Do you know of any reason, whether we've touched on it or not, why you could not be a fair and impartial juror in this case?

A I don't think I could ever not be fair or impartial. I don't think I could ever not be fair and impartial, but I

wouldn't want to serve on it, though, but that's my true feeling.

Q You've been very polite, ma'am, and very kind to us and very attentive and I appreciate it.

MR. MACALUSO: Your Honor, **[2037]** I'll pass the prospective juror.

THE COURT: Thank you, Mr. Macaluso. You have five extra minutes if you need it.

[2038] EXAMINATION

BY MR. CUNNINGHAM:

Q How do you pronounce your last name, please?

A Boggess.

Q Ms. Boggess, my name is Cunningham and to my immediate left is Mr. West. As Mr. Macaluso indicated to you, we have been appointed to represent Mr. Miller-El in this case. Just briefly I would like to ask you a few questions because I think you have answered their questions and based upon the law, you're qualified as a juror in this case.

On your information sheet for religious preference or your church, OCB, is that E or F?

A F, Oak Cliff Bible Fellowship.

Q Where is that located?

A It's on Camp Wisdom in Dallas.

Q I've been trying to figure in my mind where your husband works in the district clerk's office. Is his hair sort of salt and peppered?

A Yes. He is crippled.

Q Oh, he works in the back. I've **[2039]** known him a long time. This is for the purpose of the record. What is your race?

A Black.

Q She's taking down everything you say and unless we ask you, it's not in the record. Do you teach Sunday school?

A Yes.

Q You're a member of the Visiting Nurses Association?

A Right. I'm a therapist.

Q Do you know Etta Bernice Johnson?

A Uh-huh.

Q How long have you known Etta?

A I don't know her personally. I just know her name.

Q She is also a member of your association?

A Yes.

Q You live at 5717 Fox Hill Lane?

A Right.

Q How long have you and your husband and children lived there?

A Almost eight years.

Q Are you and your husband buying your home there?

[2040] A Yes.

Q Two of them attend public school?

A Yes.

Q Is it public or private?

A Public.

Q Where does Ke'Andra go to school?

A Atwell Junior High.

Q And your son goes to school where?

A Turner. All three of those are boys.

Q Have you taken any other courses above your BS degree?

A No.

Q You don't remember what security agency your husband used to work for?

A I think it was Preston or something like that. I don't know if they're still in business.

Q What did he do for them?

A He rode the Surtran buses and monitored the bus drivers.

Q You've never had any criminal jury service?

A. No.

Q How many times have you been **[2041]** called down?

A I don't know. I've only served once.

Q At least one time you served on a civil and while—or you took a recess and they settled it?

A Yes.

Q Ms. Boggess, you understand that in a criminal case, the State of Texas has the burden of proof in a case. That's these gentlemen over here?

A Uh-huh.

Q If you were chosen as a juror in this case would you hold them to their burden of proof?

A I beg your pardon?

Q The burden of proof is on the State to prove its case beyond a reasonable doubt. The law says that, if they do not prove their case beyond a reasonable doubt, the jury should find the accused not guilty. My question to you is, if they failed to prove their case beyond a reasonable doubt, would you have any problem with finding the accused not guilty?

[2042] A No, not if they didn't prove it.

Q In other words, if they don't prove it, guilty. That's what the law expects and you that?

A Yes.

Q I'm not confusing you, am I?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: The State will exercise a preemptory challenge, Your Honor.

THE COURT: Okay. Ms. Boggess, you'll be excused from service in this case. We appreciate your attention down

here today and your patience with us and tell Joe hello for me, would you? He's been a witness up here a few times. Have a good day.

(Whereupon, Ms. Boggess left the courtroom, after which the following proceedings **[2043]** were held.)

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: The State would like to put in the record at this time the following reasons for exercising our preemptory strike for Ms. Boggess: Number one, she stated that she wasn't sure she could actually give death and, as a matter of fact, because of the big decision in this case, she did not want to serve on this jury. It is my understanding that the Court is also placing the questionnaires in the Court's records. I would like to call the attention of the Court to where Ms. Boggess said she was a defense witness for her nephew who was evidently charged with stealing at one time. It is for those reasons that we chose to exercise our preemptory strike on this juror.

MR. CUNNINGHAM: Ordinarily, **[2044]** Your Honor, I probably would not say anything, but since the State is putting into the record that alleged reason for striking Ms. Boggess, I would point out to the Court that of the five blacks that have qualified all five have been struck, by the State, those being; Roger R. Bozeman, number seven; Billy J. Fields, number nine; Hilbert Gitchaway, number seventeen; Virginia R. Smith, number nineteen; Joe A. Warren, number twenty-eight and now Ms. Carrol Boggess, who they just struck.

THE COURT: She was number forty?

MR. CUNNINGHAM: Number forty. Joe A. Warren is number twenty-eight.

THE COURT: Let me tell you what my records show.

MR. CUNNINGHAM: Did I say Virginia Smith—Bozeman, Fields, **[2045]** Gitchaway—no. Gitchaway was by agreement. I'm sorry.

Bozeman, Fields, Warren, Rand and Boggess.

THE COURT: Let me make sure that the record is clear. I show that Mr. Bozeman—

MR. CUNNINGHAM: Was their first strike.

THE COURT: I think that's probably correct. We've had several blacks either excused by agreement or for cause. Let me clarify something because I do remember now that we agreed or it should be clear that we're going to put into the Court's file any questionnaires of any the State's strikes because I can go back and get them in there. I don't know if I've got all of them in there right now or not.

REPORTER: I have them.

THE COURT: Mr. Cunningham, to make sure that the record is in **[2046]** the shape that you-all want it for any reason, will you make sure at some point after voir dire that Ms. Bardwell has the questionnaires of all the jurors that you want in there? I'm sticking some in the file as we go, but I prefer to let the court reporter keep track of that, if you-all wouldn't mind.

Let's bring in the next juror.

(Whereupon, these proceedings are continued in Volume V.)

* * * *

[2170] WAYMAN A. KENNEDY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Kennedy. I want to start out by reintroducing everybody who is sitting here. You met almost all of us yesterday. My name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso and the gentleman seated behind me here is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas and

we've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Kennedy?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Mr. Kennedy.

[2171] Q These two gentlemen have been appointed by Judge McDowell to handle the defense of Thomas Joe Miller-El. He's the man down at the far end of the counsel table. I think you can see him if you lean forward there.

As you know from yesterday Mr. Miller-El is indicted and charged with the offense of capital murder. That's the most serious criminal offense anyone can be charged with in the State of Texas. Now, Mr. Kennedy, I don't believe from looking at your sheet that you've been on jury service before; is that right?

A That's correct, I haven't.

Q Now, if you remember yesterday we were in here and you were in a group of about forty people out there. On most normal cases you would have remained in the group like that for us to talk with you. We would have asked you some questions out there and pointed some things out to you in front of the group. Because this is a death penalty case and it is a situation where people have very strong feelings on both sides of some of these issues **[2172]** that we're going to talk about, the law allows us to talk to you individually like we're doing here. I think the hope is that, if you're in here by yourself, you will be able to be a little more comfortable and a little more open with how you feel about things than you would be if you had to talk in front of forty or fifty other people who are sitting out there.

What I would like you to do is the same thing the Judge told you to do and that is relax just as much as you can. Remember that there are no right or wrong answers to anything I'm going to ask you or these gentlemen may ask you. We're just trying to find out how you feel about some things.

Now, Mr. Kennedy, we've talk to—you're the forty-second person or forty-third person we've talked to in one way or another on this jury. At this time we have three jurors. You can see that it is a rather tedious process, number one, and the great majority of the people, for one reason or another, have not been suited to serve on this particular jury. We're going to talk to you about some things that you may or may not have some strong **[2173]** feelings about and I hope when you do have, you will express those. I hope, if I talk too fast or say something that isn't clear or you have questions, I hope you will stop me, so we can get those cleared up while we're talking here today. I want to be sure we're understanding each other on what we're talking about.

A All right.

Q If you will bear with me, here we go. Now, Mr. Kennedy, I feel like it is only fair that you know from the outset what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present twelve jurors, to you if you're on that jury, the type and quantity of evidence to convince a jury to find Mr. Miller-El guilty beyond a reasonable doubt of capital murder. We further anticipate that we can present sufficient type and quantity of evidence to have a jury answer those three questions that you see on the boards yes.

If those three questions are answered yes, each one is answered yes, it **[2174]** results in the death penalty as a matter of law. There is no option. The Judge doesn't have an option to do anything different. Three yes answers equals the death penalty. We anticipate—

A The jury is the one, if they answer the questions correctly, the Judge cannot change it?

Q That's correct. The Judge has no option whatsoever. If the jury comes back and answers each of those questions yes, yes, yes, Judge McDowell has to, under the law, and is required to assess a death sentence for Thomas Joe Miller-El. If one of those questions is answered no, then a

life sentence is assessed. The Judge has no option whatsoever in either case. We anticipate, Mr. Kennedy—being very open and honest about it—if those three questions are answered yes, at some point Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death and **[2175]** his life as the result of the verdict in this case if those three questions are answered yes.

I feel like it is only fair to you that we're clear about it and you know where we're coming from on this thing and that's why I tell you that so you know what you're dealing with because I would guess coming in yesterday most people feel, well, maybe I'll get on a civil case or I'll be on a little theft case or something like that.

A Yes. That's the normal feeling.

Q And then you walk in and you get hit with a capital murder, I would guess it's a little bit of a surprise, a little bit of a shock?

A Yes.

Q You did have a chance yesterday to fill out a questionnaire. I know everybody was in and out of the courtroom and back and forth and in the hall and back in the courtroom and so on, so you didn't really have a whole lot of time to sit down and concentrate on answering the questionnaire, but there was one question on there about the death penalty. You answered it, but you've had a chance to sleep in it a **[2176]** little bit, to give it some more thought, I would guess, since then. Would you just tell us in your own words, if you would, how you feel about the death penalty and whether it serves a purpose in our society today?

A Well, my feelings are kind of like what I said on the questionnaire, that I really don't believe in it only in extreme cases and I would say like a mass murder. Someone broke into this courtroom and killed all of us, I would say yeah, put him to death because that would be a mass murder

type situation or in a situation where it was a mutilation, where they come in and cut the body all up or something like that. Normally I wouldn't say on just the average murder case—I would say no, not the death sentence.

Q Okay. Well, let me just take a couple of minutes to explain a little bit about the Texas law with relation to the death penalty. The death penalty is an option in Texas only in cases of what we call capital murder. That's murder, number one, but murder in a special situation. For example, if a certain class of persons is killed, murder of a **[2177]** police officer or a fireman on duty, a prison guard, something like that, or a murder for hire fits in there. Second is one that you mention, a mass murder like the incident' we had here a, year or two ago. The third one is what we're dealing with here, Mr. Kennedy, and is something we call murder plus, for lack of a better name, I guess.

We have to prove, number one, that the individual committed the offense of murder but that he did that while in the course of committing or attempting to commit another offense, burglary or robbery or rape or arson, for example. Specifically in this case we're talking about murder in the course of a robbery. Now, the law in the State of Texas says that the death penalty is appropriate in those cases. It can be considered in those cases.

I guess what I would like to know from you, first off, Mr. Kennedy, based on what you just told me, do you feel like the death penalty should be appropriate in cases like that or are those not serious enough?

A The circumstances around it, or **[2178]** are you saying a small—you know, what type of robbery was it? Was it a small robbery like where he held up somebody in a back alley or something and shoot them because they won't give him their money or are you talking about like a bank holdup where you shoot an armed guard or what?

Q I'm not allowed, Mr. Kennedy, under the law, to go into any of the facts of this case. None of the lawyers can and the Judge can't at this point.

A So that is the kind of thing that would weigh my decision as to why a person should be put to death for shooting someone during a robbery. To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough and make sure that person never comes up for parole.

Q I'm sorry. I didn't hear what you said.

A I said like a life sentence where they wouldn't never come up for parole. If the crime was severe enough—well, I have a question and a statement. Some people are put into prison with never coming up for parole, **[2179]** right, and some life sentences still come up for parole in like twenty years or something like that, right?

Q I can't go into the parole laws or anything having to do with that.

A That's what I'm saying. My opinion would be just like lock them up and he would be without ever coming up for parole. It would be a life term sentence.

Q Let me go just a little bit farther and see—I can't go into the facts of the case, but let me go a little bit farther and see where we wind up. If a person is convicted of capital murder—and we've alleged basically this in the indictment, Mr. Kennedy; That this Defendant did knowingly or intentionally cause the death of another individual and that he did it while in the course of committing or attempting to commit robbery. That's not word for word, but it's basically what the indictment says. If you as a juror or if the jury convicts a man of this offense, capital murder, there are two possible punishments under the law, life—and that life sentence is subject to the same rules and **[2180]** regulations and considerations and restrictions as any other life sentence in the State of Texas, all the same, or a death sentence. Those are the two options. If he is convicted of capital murder, it goes to only those two options. That's what we're dealing with. That's about as far as I can go without going into the facts.

The law in the State of Texas says the death penalty is appropriate for consideration in this type of case. In order for a person to be qualified to serve as a juror, they have to

be able to understand that and not have such problems with it that it would affect their deliberations in the case.

Now, what is going to happen in the procedure basically is this: This trial is what we call a bifurcated trial. There are two stages. First of all, there "is the guilt, or innocence phase of the trial. It's at that point that we have to prove to you, number one, that the Defendant committed the murder and we have to go further to prove that he committed that while in the course of committing a robbery or attempting to commit a robbery. Am **[2181]** I clear with you so far?

A Yes.

Q If we prove that to you beyond a reasonable doubt, the it is your duty as jurors and as a jury to find the Defendant guilty of capital murder. If we fail to prove that to you beyond a reasonable doubt, it is your duty to find him not guilty or, if we prove some lesser offense, to find him guilty of that depending on what the facts show.

A That's understandable.

Q Assuming that he is convicted of capital murder, then we move to the second phase of the trial, that being what we call the punishment phase of the trial. Now, under the old law, up until about twelve or thirteen years ago or something like that, the jury on a capital murder case listened to the evidence and went out into the jury room, took the verdict form and they put life or death and signed their name and that's all there was to it. That was the verdict. Again, the Judge had no discretion. If the jury said life, he got that life sentence. If they said death, he got the death sentence.

[2182] Today the legislature has done things a little bit differently. They have set out three questions that must be answered. After hearing all of the evidence, you as a jury, if you're on that jury, will be asked to answer those questions either yes or no. Why don't you take just a minute to look at those questions and read them over?

A (Juror complies.) Are the blanks left for the name?

Q Those will be names, yes, sir. Have you had a chance to read those over?

A Yes, sir.

Q Now, I don't know why the legislature in their wisdom set up the questions rather than just asking the jury to write life or death. The thing I want you to understand, Mr. Kennedy, if the effect is the same. If the jury answers those three questions yes, he gets the death penalty, period, end of story. That's it. We anticipate, if those three questions are answered yes, at some point this man sitting right down here will have his life taken by the State of Texas. If one of those questions is **[2183]** answered no, he gets a life sentence. Again, there is no option. It's that same life sentence that we talked about.

Now, you've indicated that you have a real question whether you feel the death penalty is appropriate in this type of case, a murder plus a robbery.

MR. CUNNINGHAM: Your Honor, we'll object to that statement. That is an improper statement of what this prospective juror has said.

THE COURT: I'll overrule that. I think Mr. Kennedy understand the question. Mr. Kennedy, let me tell you, if you don't understand any question the lawyers ask or want it clarified, please let us know. I'm counting on you to do that. Go ahead.

A Repeat the question again.

Q Okay. Mr. Kennedy, first of all, let me say one thing. There is no way I want to or would try to put any words in your mouth or argue with you or force you to say anything **[2184]** that isn't what you feel or what you believe. So if I misstate something or if I say something you don't agree with, I hope you will tell me. I think you're strong enough that you will tell me if I say something wrong.

A I will.

Q Okay. I thought you told me that you had some questions or some reservations about the death penalty being appropriate in this type of case; is that right?

A That's right.

Q Okay. First of all, let me tell you this: I think I told you that we've talked to about forty-two or forty-three people or something like that and we only have three jurors at this point. The people that we have excused or the people who aren't suited to serve on this jury aren't bad people. If you sit on the jury, you don't get brownie points and if you don't sit, you don't get any demerits as far as citizenship or anything like that. It's a difficult case. There are going to be difficult decisions to be made and what we're looking for is twelve people who can follow the law and make those decisions. If **[2185]** somebody can't do that or would have problems doing that, then we don't want to force them to sit on the jury.

A This, I understand. I can understand that because what you're saying is, you don't want somebody who has already formulated an opinion before the trial even starts.

Q Exactly.

A That's just like what I was telling you. The reason my thoughts are different for the death penalty versus a life sentence may be because I haven't heard the evidence on it. That's the reason I said that mine are different on the situation, the way I look at it, the way I would feel.

MR. WEST: Mr. Kennedy, would you speak into the microphone. I can barely hear you.

A As I was saying, it would have to be like the circumstances—I would have to see—you know, before I form a complete conclusion as to what because I don't about people, but myself, before I would say I would **[2186]** go along with the death sentence in some cases and some cases not, as I stated briefly on that, mass murder or something, yes. It also depends on how much—someone else in another situation might give a life sentence. That's the only thing that I'm saying.

Q You're right, Mr. Kennedy. We want twelve people that have an open mind sitting over there. We don't want, and we're not going to have, twelve people over there frothing at the mouth and jumping up and down to execute somebody. That's not what we're going to have on this jury. By the same token, we need twelve people who can realize that they're going to make a decision with reference to these questions and can make those decisions without being affected by their personal feelings about whether the law is correct or not or their—if they don't feel that the death penalty is appropriate in this type of case, then they have trouble, a person would have trouble answering those questions one way or the other. We want twelve people who can answer those questions and make those decisions and handle that without reservations. Whether **[2187]** the questions are answered yes or no, they can make that decision.

I know you're in a difficult position because we can't tell you what the facts are and we aren't allowed to because you have to hear them from the witness stand.

A I can understand that.

Q If I told them, Mr. Cunningham or Mr. West probably would tell them a different way and none of that is evidence. The evidence comes from up there, so we can't even go into an example of what some facts might be. Understanding that we're dealing with murder in the course of a robbery of one individual, an individual by the name of Douglas Walker in this particular case', but one individual, he's killed while in the course of committing a robbery, is, in your mind, the death penalty appropriate for that type of case, understanding that you don't know the fact's of this case, but for this type of case, the death of one person during a robbery?

A There again, you're asking me something—it's kind of hard to say because one thing, you would have to formulate an **[2188]** opinion and my opinion would be—for one thing, I don't know all the facts. I guess what the law is saying—the state law says that it is okay to do it because you said that the state law says that a person can be put to death for doing it, so are you saying what are my feelings of the law or what?

Q I want to know—we know what the law is. I want to know how you feel, what your personal feelings are.

A To me, it would depend on the circumstances.

Q Okay. We don't want to force someone, Mr. Kennedy, to take an action or to enforce a law that they have strong feelings against or that they don't agree with.

A As I stated earlier, if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances. I would have to see more to say yes because I do have reservations about it.

Q You looked at those questions a few moments ago and read over them. **[2189]** Understanding that a yes answer to each of those questions results in a death sentence—

A Because you said—I know deliberately—and just picking something out of each one—you think they would commit another crime—I would say yeah because that person, if they was committed to a life sentence, you're not going to let them go back out into society, anyway, again, so the death sentence probably would be okay.

REPORTER: I didn't get that last remark.

A I said the death sentence probably would be okay because, if you're going to put a person away forever and if the crime was bad enough, then I would say yes, the death sentence would be all right.

Q Let me go a little bit farther and ask this: I told you that the legislature put those questions in rather than just have the jury write life or death. If you were on the jury and you, after hearing all the facts, felt that this man did not deserve the death penalty, those were your personal feelings, and nevertheless we have proved to you that a yes **[2190]** answer should be given to each of those three questions, would you give a yes answer to each of those three questions knowing it would result in the death sentence even though your personal feelings were that the man should get a life sentence?

A I don't know. It would depend on the evidence.

Q We have to prove to you that those questions should be answered yes and that burden of proof is here on this table and stays here. We have to prove it to you, but assuming we proved to you that the answer to those questions should be yes, even if your personal feelings are such—you know how when you hear about something or you see something or you listen to something, you tend to get personal feelings, well, this ought to happen, an emotional or gut reaction type feeling. If your gut reaction and your emotional feeling is that the man deserves a life sentence and should not be executed, but nevertheless we prove to you that the answers to those questions should be yes, could you and would you answer them yes knowing it would result in **[2191]** the death sentence even though that's contrary to your emotional or gut reaction?

A Yeah, if it was proved, like I say, without a doubt. You have got to prove it without a doubt.

Q Now you said "without a doubt."

A What I mean is, the evidence has got to be convincing enough.

Q Beyond a reasonable doubt?

A Yes.

Q On TV you hear beyond a doubt—

A That's right, but that's basically what I'm saying. The evidence or whatever you would present would have to be convincing enough.

Q If we convinced you beyond a reasonable doubt, you could answer those questions yes? Even if you didn't personally or emotionally want to give him the death penalty, you could answer those questions yes?

A Yeah—you said personally?

Q Right.

A Yes.

Q In other words, your personal and emotional reaction is this guy does not deserve **[2192]** the death penalty. He deserves a life sentence not the death sentence. We

proved to you that those questions should be answered yes, could you answer them yes?

A It's kind of a contradicting statement. You're saying would my convictions that I believe that it should be a life sentence, but then you say you proved to me that—could I state the death sentence and answer those questions yes. Those are kind of contradicting statements.

Q They sure are, but that's why the questions are there. The legislature—I don't know what their reason—maybe they wanted to put a buffer in there between a person's emotions and the actual verdict. What the legislature has said is that those questions should be answered based on the proof. What I need to know from you, Mr. Kennedy, is, if those questions are proved, a yes answer to those questions is proved, could you answer them yes even if you personally felt that the man should get a life sentence rather than the death sentence? You know, if you were just going to write on the verdict form life or **[2193]** death, you would write life?

A Uh-huh.

Q But we have proved that each of those should be answered yes. Could you nevertheless answer them yes?

A Yes, I believe so.

Q You think you could?

A I think I could if it was proven.

Q We have to prove it to you.

A It's got to be proven.

Q Okay. Now, when we're talking about proof, one other thing that may come up in this case—we don't anticipate that it will, but it may. You remember I told you that we call this a murder plus. For simple murder in the State of Texas, the death penalty is not appropriate under the law. It's not a consideration. If we prove to you that the person knowingly or intentionally caused the death of another human being, the death penalty is not appropriate. It's a different situation.

We talked about murder and there is no first degree, second degree or third degree murder in Texas. It's just murder. **[2194]** What that is, is knowingly or intentionally causing the death of another individual. We aren't talking about self-defense. If it was self-defense, the person would be not guilty. If it was an accident, the person would be not guilty. If it's a killing in the heat of passion—for example, you have some children and I have a little four year old girl. If I came home and found out somebody had raped my little four year old girl and the guy that did it is standing down the street laughing about it, I might very well take a gun and go down there and do a little justice of my own in that situation.

A I can understand that.

Q A killing in the heat of passion, that's not murder. When we talk about murder in the State of Texas, we aren't talking about insanity. If a person is insane, they're not guilty. We're talking about the knowing or intentional taking of another human life without any legal justification or excuse whatsoever. The guy knew he was going to do it and he intended to do it and did it without any legal justification or excuse whatsoever.

[2195] Now, the maximum sentence for something like that is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?

A Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.

Q It's either murder, knowing or intentional taking of a human life or it's not murder.

A A person just plans to go out and shoot someone, you know, like I go out and shoot the first person I see or I shoot the first black or white or something like that, you go out and shoot someone like that, that person, I'd say, the

minimum would be life because they shouldn't even be in society.

Q Okay. I'm not quite sure how to go from here, but murder can come up in a variety of situations. You would agree with me on that?

A Yes.

Q Again, we're not talking about **[2196]** self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing—

A I know you said the minimum. The minimum amount that I would say would be at least twenty years.

Q For the taking of another human life?

A Yes.

Q Without any legal justification or excuse?

A At least twenty years with no parole.

Q And no parole in it?

A Right.

Q Okay. Mr. Kennedy, could you—again, for the knowing in intentional taking of another human life without any legal justification or excuse,, no matter what the facts and circumstances were—again, we're not talking about self-defense or accident or killing in the heat of passion. We're talking about murder. Could you under any set of circumstances, no matter what the facts and circumstances were, ever assess, actually give, **[2197]** a five year sentence?

MR. WEST: Your Honor, I would ask that sentence be completed, if he felt as though a sentence of five years would, in fact, be warranted, if he felt in his mind that it would be warranted.

MR. CUNNINGHAM: Your Honor, we would also further object that the State has not advised Mr. Kennedy that the statute in Texas provides that the minimum punishment is not less than five or more than ninety-nine or life. I think it is an unfair question to this prospective juror to ask him about a five year sentence and not tell him that the statute says he can give five years.

THE COURT: I think his question included that five year minimum, but reask the question, Mr. Nelson.

Q Mr. Kennedy, basically what I'm **[2198]** asking is, I want to know your personal feelings. We've talked about, through this whole thing, your personal feelings. That's what we're interested in. Could you—and I'm not going to go back through the whole thing again—for the knowing and intentional taking of another human life without any legal justification or excuse, under any facts and circumstance no matter what they were, give, assess—if the law allowed you to give five years and it was proper to give five years, could you ever give five years?

A Here again, like I say, it depends on the circumstances. I know I probably wouldn't, no. Right off my head I would say no.

Q Okay. No matter what the facts and circumstances showed?

A You know, you're saying just straight out and out, yeah, but if it was something different like where he had maybe—you know, in the heat of passion or self-defense or something. If it wasn't that at all, it was just an out cold-blood murder, then no. I would say at least twenty years.

[2199] Q Again, if it's the heat of passion, it's not murder. That's what we call voluntary manslaughter.

A Okay, but that's still going to carry some time with it, isn't it?

Q Sometimes, but we're not even talking about that. We're talking about something more than that. We're talking about murder. We aren't talking about self-defense. We aren't talking about accident. We aren't talking about the heat of passion. We're talking about murder, knowingly or intentionally taking another human life. You're telling me that you would give twenty years and could not give five years; is that correct?

A Right.

Q I'm not misstating that, am I?

A No. Like it's cold-blooded murder, I would say at least twenty years.

Q Obviously you feel like human life is valuable and human life is precious?

A Yes.

Q That's the minimum value you would put on a human life; is that fair?

[2200] A That seems fair enough because the way I feel like, anyone take another person's life and it's not self-defense and it's just cold-blooded murder, then that person should at least be removed from society and at least take away twenty years of their life by taking them out of society.

Q Okay. Twenty whole years?

A Yes.

Q You made the comment earlier, no parole, but twenty years?

A Right.

Q Twenty calendar years—

MR. WEST: Your Honor, I'm going to object at this time. The Court has called time and Mr. Nelson is continuing to ask questions.

THE COURT: Well, I've given both sides a little leeway.

Mr. Nelson, your time is to a close, so bring it to a close.

Q Mr. Kennedy, my time is over and I appreciate the Judge being generous with me and letting me talk to you for just a couple more **[2201]** minutes, but I feel—I've tried to explain this as best I can. Do you feel like you understand what we've been talking about here?

A Yes.

Q I take it from what you've said, this is something you feel strongly about, is that right, and I could sit here and argue with you and argue with you and I'm not going to change your mind; is that—

A That's right.

Q I don't want to do that.

A I didn't think that you were trying to.

Q I'm just trying to find out how you feel and I don't think any of us here has a right to argue with you about how you feel. None of us is doing that and none of us is going to do that. I wanted to be sure that we're clear and you've told me that you feel like we're clear and understand what we've been talking about. I appreciate very much your time and I appreciate your patience with me in talking with me and being forthright and honest in your answers. I believe we wouldn't change your mind and I don't have any reason to think **[2202]** that you will. I'm not going to bother you any more. Mr. Kennedy, I thank you very much for your patience with me.

MR. NELSON: Your Honor, I'll pass the potential juror.

[2203] EXAMINATION

BY MR. WEST:

Q Mr. Kennedy, as Mr. Nelson said, my name is Royce West. I need to talk with you a little bit to make sure that you really understand what's going on.

Now, how many times have you been called down to serve on a jury?

A This is my second time.

Q You didn't serve the first time?

A No. The first time, when I came down, we were called up like we were yesterday, but the trial settled out of court, so they told us at that time, as far as they were concerned, we had served.

Q And you went on back home?

A Right.

Q Now, let me explain something to you. Mr. Nelson told you at the beginning that you're the forty-third person that we have talked to. Now, in a capital murder case each side has fifteen strikes that they can use for any purpose that they want to. When I say strike, I'm not talking about

physical strikes. They can say, no, I don't want this person. **[2204]** They can do that fifteen times. Now, they can say I don't want this person and they don't even have to give a reason, if they don't like the way they part their hair, if they don't like the color shirt they have on, the color of their suit.

Now, both the State and the defense have that option. Some of those strikes have, in fact, been used in this particular case. In fact, the State has used eight and the defense has used six, so that's fourteen strikes that have been used for some purpose or another. Do you understand what I'm saying?

A Uh-huh.

Q Okay. Now, the only issue that we really need to address—and no one is asking you to make a decision until you hear the facts of the case. The law requires that, in order for you to be qualified to sit on this jury, you have an open mind. From listening to your responses, I believe that's what you're saying, that you would have an open mind; is that correct?

A Yes.

[2205] Q Now, sir, would it be a fair statement to say that, if you took the oath—and the oath being that you would a true verdict render based on the law and the evidence—would you do that?

A Yes. Well, the evidence and the law, but the evidence being the main thing.

Q The evidence being the main thing?

A Yeah.

Q But you've got to stay within the confines of the law, too?

A Well, yes.

Q The Judge says that it's a theft case, for example, that a person commits the offense of theft where he knowingly and intentionally takes someone else's property without their consent, in order to find that person guilty you would have to listen to the evidence and make a determination as to whether or not you believed the evidence and if you believed the evidence, you could follow that oath; is that correct?

A Yes.

Q If you didn't believe it, you could say that the person is not guilty?

[2206] A Right.

Q Okay. The same thing applies to punishment. Now, Mr. Nelson asked you initially what's the minimum that you could give a person for first degree murder, knowingly and intentionally taking someone's life without any legal justification or excuse. I believe that your response, sir, was twenty years?

A Yes.

Q At that time you did not know what the range of punishment was that the law provides, did you?

A No, I didn't.

Q Now, understand that the legislature, the people that we elect down in Austin, have set that range of punishment and that range of punishment has been in effect ever since I've been a lawyer and I've been a lawyer for some six years.

Now, obviously if the range of punishment is from five years to ninety-nine year or life, there is a reason that they did it and that's because there is a broad range of facts and circumstances that would necessitate a minimum of five years **[2207]** all the way up to life and an optional fine of $10,000.00. Would you agree with that?

A Yes.

Q Now, the law says that, if you hear evidence that you feel as though warrants the maximum of life, in order to be qualified as a juror, you have to tell the State that, if I hear those facts and circumstances and I feel as though it's proper in my heart, I feel as though it is proper, I can give that person the maximum of life. Can you do that?

A Yes.

Q The law also says that you have to be able to tell the defense that, if you hear the facts and circumstances and you feel as though it's proper in your heart, you would be able to consider and, under the proper facts and circumstances, give the minimum of five years. Can you do that?

A Now, saying that you're on the jury and there is twelve people on this jury, right?

Q Yes, sir.

A One person—and let me say it was myself—say that I said—say the case **[2208]** come out to where it could be the minimum. Say that I wanted twenty. My one against eleven—

Q Now, the minimum is five.

A I know that. That's what I'm saying, see. I'm saying twenty and they're saying five. My one against eleven, what would that mean?

Q In a situation such as that, the Court will tell you basically you are to intelligently and honestly deliberate and try to reach a verdict if it doesn't do you any harm.

A Every one has to agree on the same amount of time?

Q It has to be a unanimous verdict, yes. Now, again, the law only requires—we're not asking you to commit to giving anybody five years. The only thing we're asking you to do is to have an open mind, to listen to the facts and if you feel as though the facts are warranted, if you feel as though the facts warrant a minimum of five years, you be able to have an open mind and be able to give five years, if you feel as though it is warranted. Do you understand what I'm saying?

[2209] A I understand what you're saying.

Q Now, can you do that?

A It would greatly depend on the facts because here again you're coming back to the law. You know, you keep putting that against my personal opinion and the law. Now,

like you say, the law has a minimum of five. What I think, my personal feelings, but here again I'm only one.

Q It would depend upon the facts, right?

A Yeah.

Q If you felt as though the facts warranted five years, you would be able to give five years and if you felt as though it didn't warrant five years, you would be able to give twenty, thirty or all the way up to the maximum, but you would have to listen to the facts first?

A You would have to listen to the facts. But also, when you—like I say, here again, I always think about a jury is you have a number of people. You're not only taking one person's complete—you're looking at eleven other people all total?

[2210] Q That's correct.

A Like you-said, they've got to come to a unanimous decision and somewhere in there, it's going to be some concession.

Q Exactly.

A There's got to be some concession between the members of the jury.

Q Okay. See, each juror that is selected in this case or any case, whether it be down in municipal court where the maximum is a $200.00 fine, in order to be qualified you must say—and not only say, but you must be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum all the way up to the maximum. Nobody is asking you to commit to anything. I'm not saying, hey, if you were on the jury, give my client the minimum. I'm saying be objective and keep an open mind and be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum if you believe that the facts warrant that particular penalty. Each juror that serves would have to be able to do that. Again, no one is trying to pin you down. We just want to **[2211]** make sure that you're qualified for the whole range of punishment.

Now, you said this was your second time down here. There is an infinite number of examples or situations. That's why the range of punishment is so broad. The legislature has set this range of punishment and obviously when they set this range of punishment, they took into consideration the myriad of circumstances and that's why the range is so broad. Do you understand what I'm saying?

A Just to get this clear, it's a minimum of five years for, like he was speaking earlier, murder, just straight out murder?

Q Straight out murder, yeah, and a maximum of life, ninety-nine years or life and an optional fine of $10,000.00. No one says that you have to give the maximum and no one says that you have to give the minimum. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum or the maximum or anything within that range if you think that is the proper thing to do. You make the determination as to whether or not you think **[2212]** it's proper based on the evidence that you hear.

A The evidence is the main thing.

Q Can you do that, sir?

A Well—

Q Keep an open mind, that's all we're asking you to do.

REPORTER: What was your answer?

MR. KENNEDY: I didn't. I just said well.

A Like I say, it would take probably a lot of thinking on my part because for—to me, that's a broad range, five years to ninety nine-years. It seems like to me five years is a small amount to put on a person's life. It seems like the value of a human life is more than that. To say that I might take a person's life and I might only go to jail for five years and a $10,000.00 fine. That would be the minimum that you would be looking at.

MR. NELSON: Excuse me, Judge, and excuse me, Mr. Kennedy. You made a comment that the minimum was five years and a **[2213]** $10,000.00 fine. I think it needs to be clear that the fine does not have to be assessed. The minimum is five years with no fine whatsoever.

Q But also, the fine can be assessed, too, though. You don't have to, but you can.

MR. NELSON: But that wouldn't be the minimum. If a fine was assessed, it would no longer be the minimum.

THE COURT: You understand that, don't you, Mr. Kennedy?

MR. KENNEDY: Yes.

THE COURT: That fine is at the discretion of the jury, but is part of the potential punishment.

Q Okay. Now, are you trying to think up some. facts that would warrant a five year sentence at this time?

A Normally in your mind you would think about it because when you say that the minimum is five years, you would try to think **[2214]** of what situation would come up where a person would only get five years.

Q Now, realize, Mr. Kennedy, that this is your first time down here. Now, you probably have fifty years of trial lawyer experience sitting before you and that's not even including the Judge's experience. The legislature set that range of punishment, from five to life. You don't have to sit there and think of a situation. The only thing that we're asking you to do is to have an open mind to the evidence in the case, just have an open mind to the evidence, and if the evidence establishes in your mind that the proper facts and circumstances have, in fact, been presented and you feel in your heart that the case should be a five year-case, that the sentence should be five years, then be able to assess that, consider it and be able to assess it based on the evidence.

MR. MACALUSO: Excuse me, Your Honor. I'm going to have to interrupt, Mr. Kennedy, and I apologize for that, but I have to object that we're kind of getting **[2215]** a little bit far afield. The prospective juror should be reminded that

we're still talking about a murder case. We haven't heard the word murder in quite a while. It's a murder case where one person knowingly or intentionally—

MR. WEST: Your Honor, I would ask that counsel make a legal objection.

MR. MACALUSO: He can't answer the question—

THE COURT: Ask your question again, Mr. West.

Q Mr. Kennedy, do you understand that we're talking about murder?

A Yes.

Q Okay. That's what we've been talking about for the last five minutes, right?

A The last hour, in fact.

Q If for some reason I go to another subject, I will make sure that you know we're going to another subject, otherwise we're talking about murder, okay?

[2216] MR. MACALUSO: I wasn't suggesting that you went to another subject, Mr. West.

Q Mr. Kennedy, again, the only thing we're asking you to do is to keep an open mind and if you feel as though the facts warrant a sentence of five years, you be able to assess it. If you feel as though it warrants life, you be able to assess it. Just keep an open mind, that's all we're asking you to do.

A I feel that I'm pretty much an open-minded person, but it would depend on the facts.

Q That's what I'm saying. It depends upon the facts. That's the whole point. It depends upon the facts that are presented to you. If you feel as though it a calls for five years, whether you can think of a situation right now or not—

A You know, as I have spoken earlier, even if I said that it would come up on a minimum of twenty, which eleven other people on a jury—and you know, any one—like I said, you-all being out there, you-all know this, even if one person did decide, one **[2217]** person is not going to be the one to

decide the whole verdict. It's got to be a consensus of twelve people.

Q But those twelve people all must be able, in order to be qualified to serve on a jury, to consider the full range of punishment and that's what I'm asking you, to be able to consider and, under the proper facts and circumstances, be able to assess five years and all the way up to life. Like you said, it depends upon the facts.

A Yes, it does.

Q Would you be able to consider the full range of punishment and be able to assess it depending upon the facts that you hear?

A I would say I don't know because it would have to depend on the facts.

Q That's what I'm saying, it depends upon the facts. I'm not saying—again, I'm not trying to commit you to—

A As I said earlier, my personal opinion would be I would say a minimum of twenty. If I was going to be one of the lawmakers or something, I would say a minimum of twenty.

[2218] Q I understand that and you have a right to feel that way, but what I'm saying is, the full range of punishment—in order to be qualified to sit on the jury, you must be able to follow the law and the law is saying that the full range of punishment for murder is from five years to life. I'm not asking you to commit to five years. I'm asking you to have an open mind to five years to life. If you hear facts that warrant the minimum of five years, would you be able to assess it under the facts and circumstances as you view them?

A Yes, I believe I could.

Q Okay. Now, you're saying that you believe that you could. Because of the nature of this particular case—and the law requires me to make sure that you understand—we can't have believes. We have to have a position on it, yes or no. Yes, I will be able, to consider the full range of punishment instead of I believe I could. Again, you haven't heard

the facts. You need to have an open mind to the facts. That's all we're saying.

A That's what I'm saying will determine the whole case, the facts.

[2219] Q Exactly.

A Because like I say, you aren't guilty until proven guilty.

Q You may never hear a five year case sitting on this jury or any jury, but the law just requires that, if you did hear a case where you believed five years was the appropriate punishment, you would be able to assess that five years. Can you do that? You said I believe I could.

A Here again, I say it would be—I would have to hear the circumstances. It's hard to say whether I could be open-minded or not. It would just have to depend upon the circumstances. I think I'm a reasonable person, you know. Anybody that is a reasonable person, like dealing with your own kids and stuff, you know you would have to be able see the facts and then you would deal with the situation. I've been a school teacher, so I know with kids, when you're dishing out punishment, you have to deal with the facts. Now, what your beliefs are up front and once you deal with the facts, then you might make a different decision because all cases are not **[2220]** the same and that's why you've got this broad range. It also depends on the circumstances and that's why I keep going back to that because it's hard to say that you would do a certain thing in any given situation because most people are going to do things differently.

Q See, again, I don't know whether you're misreading me or not, but I'm not trying to get you to commit to anybody's ideas.

A I know what you're saying. You're saying being open-minded to it. I don't know what circumstances. I'm not that familiar with the law as to what circumstances would warrant five years and which would warrant life.

Q And nobody is trying to get you to say what circumstances. There is no way in the world that you could

imagine all the circumstances sitting up there on the witness stand and the law won't let you. The only thing that the law is asking you to do is to—you may not ever hear a case where you would give the minimum of five years. The law only requires that if you do hear that case, if you do, within the next ninety-nine years, a hundred years or so, if you heard that **[2221]** particular case, would you be able to assess the minimum of five years, if you heard it and believed that it was the thing to do? You see, don't try to think of circumstances. I'm saying if you heard a case where you believed that it was the thing to do, would you be able to do it? It would have to be based on the evidence.

A Yeah, I believe I could be openminded.

Q Again, you're saying I believe. Are you saying that you could be open-minded and that you would be open-minded?

A Yes.

Q So your answer to the question is that you would be open-minded to the full range of punishment?

A Yes.

Q Now, obviously there's a conflict concerning you being able to—your response to Mr. Nelson's question and the response to my question. You -told him at one point that there was no way in the world that you could consider anything less than twenty years?

A Right.

[2222] Q Now, by me having explained to you, do you understand what the law requires of you?

A Uh-huh.

Q You've got to—

A Yes.

Q Now, what do you understand your role to be as a juror when attempting to make a determination as to what the appropriate punishment is going to be?

A The way I interpret it at this point—well, probably at any point—would be like the evidence and the way that I

feel is also going to be in with eleven other people and the way they feel.

Q What is your understanding about the minimum punishment now?

A I understand that the minimum is five years for murder and the maximum is the death sentence.

Q No. It's life.

A But we're speaking of capital murder, right?

Q We're talking about murder. We're still talking about a murder. Now, you're **[2223]** telling the Court and you're telling the defense and the State that you will keep an open mind as to the full range of punishment and if you hear facts and circumstances that you believe in your heart warrants a five year sentence and if you hear evidence from that witness stand that you believe would warrant a five year sentence, you could consider and also assess it; is that right?

A Yes—well, based on my opinions, it would have to be some strong evidence.

Q I don't have any problem with that. I'm just saying have an open mind to it. If it has to be strong evidence, then fine. That's up to you. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess it. If you're saying there has to be strong evidence, then fine, it has to be strong evidence. You're saying that you can consider and assess it if you felt as though five years was the proper punishment?

A I would say if I felt that way.

Q Again, if you felt that way.

A If I felt that way.

[2224] Q What does that mean?

A That means the evidence would have to be strong enough to make me feel that way.

Q All right.

A It would have to be very strong because, as I said earlier, I have feelings in one direction. The evidence would

have to be very strong. Very, very strong in order to make me change that feeling.

Q Right. That's all we're asking. So you're saying that you will have an open mind and if you believed that the evidence warranted it, a sentence of five years and you believe—

A You will have to really prove it.

Q Any defense attorney would have to convince you that five years was the appropriate thing to do, right?

A Uh-huh.

Q And you believed that evidence, then you would be able to give five years, right, but you would have to believe it?

A I would definitely have to believe it.

[2225] MR. NELSON: Excuse me, Mr. West and Mr. Kennedy. I'm sorry to interrupt again, but, Judge, Mr. West made a comment that the defense had to prove it, but the defense has absolutely no burden to bring any evidence whatsoever of any type at any time.

MR. WEST: I'll withdraw that, Your Honor.

MR. NELSON: Mr. Kennedy could be called upon to make that decision without the defense—

MR. WEST: I'm withdrawing the question.

Q Mr. Kennedy, if you believed—again, in order to be able to assess the minimum, you would have to believe that the evidence really called for it, right?

A Yes.

Q Okay. In order to assess the maximum, you would have to really believe that the evidence called for it; is that correct?

A Yes.

Q All right. Now, I see that you are a deacon at your church?

[2226] A Yes.

Q Who is your pastor there?

A Reverend C. H. Dorsey, Clarence Dorsey.

Q You work with the finance committee?

A Yes.

Q What position do you hold on the finance committee?

A Finance secretary.

Q How long have you been the finance secretary?

A About six years.

Q Are you a member of Prince Hall?

A I was a member of the Blue Lodge. Since I've been in Dallas, I have not been.

Q Is it a Prince Hall affiliation?

A Well, depending on the degree. I would have to check into it to see what degree it is.

Q What degree are you?

A Third degree.

Q You are a Master Mason, right?

A Yes.

Q I see you're a member of Phi Beta **[2227]** Sigma?

A Right.

Q That's a fraternity?

A Yes.

Q Now, have you ever heard of Omega Si Phi fraternity?

A Oh, yes.

Q If I was an Omega, that wouldn't make you bias or prejudice for or against me in any way, would it?

A No.

Q What do you like about the Cosby Show?

A It's putting a black family in what I would say is a good role on TV, just a standard role, you might say.

Q What type roles are blacks normally cast in in your—

A Well, they have been cast as the ones with a lot of—well, not portraying a true black family. I know Cosby might be, say, the upper end of one as two doctors in one house, but I like the show.

Q Do you listen to Tom Jones?

A Yes.

[2228] Q Do you ever listen to Willis Johnson?

A Sometimes.

Q Have you understood everything I've said so far?

A Yes.

Q Do you have any questions about what is going on?

A I think I understand what is going on.

Q What about that speeding ticket in that small town, did you understand what was going on?

A Oh, yeah.

MR. WEST: I'll pass him, Judge.

THE COURT: Mr. Kennedy, believe it or not, I'm going to be the last person that you talk to I want to make sure that I've understood your answers to Mr. West's questions and Mr. Nelson's questions. The reason I'm doing what I'm doing is, Mr. Nelson talked to you about thirty minutes **[2229]** ago and some of the things you told him—and then Mr. West asked you in the same area. There's been some time gap between them and, while I took careful notes, I want to make sure that you, Mr. Kennedy, and I are on the same wave length. What I'm going to talk about is this question about your feelings about being able, in a proper case, to assess a five year sentence.

As I recall, as Mr. Nelson summed up, you were asked to consider a situation where you as one of the jurors had found a defendant guilty of the offense of murder. No capital murder. Forget about that, just a murder case such as Mr. Nelson explained. The jury has found beyond a reasonable doubt that a defendant had knowingly or intentionally caused the death of another individual without any legal **[2230]** justification or excuse. Mr. Nelson explained that that

might be self-defense or it could be what we call voluntary manslaughter, that situation about involving your child in the sex abuse situation, or insanity. Those are defenses. If you, as one of the jurors, found that one of those things existed, you wouldn't find the Defendant guilty in the first place of murder. Do you understand? That's all out of the picture. You don't have that kind of situation.

You have the knowingly or intentionally causing the death of another individual by some manner or means, shooting, stabbing, choking. So you found the Defendant guilty of that.

Now, at this point in time, here's what the lawyers have been saying to you—and I think they were quite accurate in the way **[2231]** that they did it. They didn't mislead you or try to. The only reason I'm coming back at you is, there was gap of time. What both of them were saying is this: Both sides in this case, both the State and the Defendant, are entitled to twelve jurors over there in the jury box, if they have found a defendant guilty of the offense of murder, to have twelve people in the punishment phase of the case who can be of a frame of mind that, if they heard facts and circumstances in that case or whatever they might hear at the punishment phase, if anything, would in a proper case—that individual juror working together, as you said, with the eleven other jurors, would in a proper case be able to assess a punishment anywhere within the range of punishment that the law allows for a murder case which is five years **[2232]** in the penitentiary up to a ninety-nine year sentence or a life sentence and in addition to that, as Mr. Nelson pointed out, a fine of up to $10,000.00, if you wanted to. The question then comes down to, if you were a juror in a murder case and in a proper case, if the facts and circumstances warranted it in your mind and you thought it was proper, could you assess a five year sentence for the offense of murder, that is the knowing or intentional causing death of another individual?

MR. KENNEDY: There again, listening to what they have said and also making me think that you would also have to go along with the concept of the law.

THE COURT: What the law provides for, as Mr. West pointed out properly and I think Mr. Nelson did, too—the law doesn't **[2233]** require you to imagine the facts it would take you to give a five year sentence, but what the law is saying—and I'm not going to say it quite as delicately as they did—if you are a juror who says I don't care what the facts and circumstances I ever heard in a murder case are, I could not assess a five year sentence, that's one thing. If you're a juror who says I can't imagine facts and circumstances, but if I heard them, I could assess a five year sentence, that's still another thing. Where do you fit yourself in that picture?

Are you of the frame of mind that you could never hear a case where a five year sentence would .be appropriate in your mind for murder?

MR. KENNEDY: In those circumstances, I would have to put myself—as I've told them, I **[2234]** would put twenty years on someone's life. It seems like it would be valued at more than five, but if you have to weigh the circumstances and you look at it and you've got twelve people over there judging, your decision—you should be open-minded about it. You should be able to, with those twelve people, come to some sort of conclusion.

Now, mine may be twenty years, but I would like to judge it on the fact.

THE COURT: Well, if those facts—could there be a set of facts in your mind that would permit you to participate in a sentence of five years with your other fellow jurors?

MR. KENNEDY: I would put it this way. Are you just asking me if I could be open-minded or not because I wouldn't know how—what facts it would take to say **[2235]** this one is five years. When I think of something, I think of a murder, then I think of it as taking a person's life. I would say here is my value that I would put on a person's life. This is the way that I look at it. Now, you can present facts and I know, being on a Jury, you would have to sit there and be open-minded because you can't go in and say, okay, this person killed so hang him because you don't know all the cir-

cumstances and facts. That's what you're asking me to do, listen to the facts. They asked me opinion and I gave my opinion. If I can be open-minded—I think I can be open-minded enough, yes. My main thing is, you've got to listen to the facts.

THE COURT: If you heard a set of facts that told you five years was the proper punishment in a murder case, could you vote for **[2236]** it, a five year sentence if you heard that set of facts? Can you give me a yes or not to that? I hate to do like the lawyers did, but I've got to have a yes, I could or no, I couldn't.

MR. KENNEDY: Like I told him, there would have to be strong facts. Facts could change a person's opinion. I'm not saying a person's opinion could-not be changed, but I'm a pretty strong opinionated person. The facts would have to be—well, I know they would.

THE COURT: Did you say yes?

MR. KENNEDY: No. I haven't answered you yet. I was thinking about it.

THE COURT: Take your time. This is obviously an important question because we've spent a lot of time on it. I'm sorry that I have to bring you to the point of saying yes, you could or no, you **[2237]** couldn't, but. I do need to do that to determine your qualifications in this case.

MR. KENNEDY: I would say yes.

THE COURT: I hold that he is qualified, Mr. Nelson.

MR. WEST: Your Honor, I have a few more—

THE COURT: I'm sorry.

Q For record purposes, and I'm not asking you this to be funny or anything like that sir, okay?

A Okay.

Q You may say it's apparent in the courtroom as to what your race is, but it's not apparent on the record. This stenographer here is taking the record. Could you tell me what your race is, sir?

A Black.

MR. WEST: Nothing further.

THE COURT: What says the State, Mr. Nelson?

MR. NELSON: Your Honor, at this time the State will exercise **[2238]** a preemptory challenge.

THE COURT: Mr. Kennedy, you'll be excused from any service in this case and I want to thank you on behalf of the lawyers for your patience with us and your candid answers this afternoon. I believe you've told us exactly how you feel. You were asked some hard questions and gave some hard answers. Thank you, sir.

MR. WEST: Your Honor, before he gets off the stand, I want the record to reflect the nine strikes that the State has used, they've used six on blacks.

MR. MACALUSO: Thank you very much, Mr. West.

THE COURT: I won't comment on those number because I don't know. Let's take a very short break.

MR. NELSON: Your Honor, I want to put one other thing on the record before or after we take our **[2239]** break.

THE COURT: Do you want to do it after our break, Mr. Nelson? We'll do it when we come back.

(Whereupon, Mr. Kennedy left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead and do it now.

MR. NELSON: Your Honor, the State would like the record to reflect the following reasons for our exercising a preemptory challenge on Mr. Kennedy: He was hesitant about assessing the death penalty in this type of case, that being a murder during the course of a robbery. As matter of fact, his comment was that he felt the death penalty was probably only appropriate for a mass murder situation. He further was hesitant in answering the questions yes in spite of his **[2240]** personal feelings which would be opposite. For example, if he thought the Defendant should receive a life sentence, he hesitated for a great deal of time in saying whether or not he could still answer the questions yes knowing it would result in the death sentence. Because of that,

the State exercised a preemptory challenge on this potential juror.

(Whereupon, a short break was taken, after which the following proceedings were held.)

THE COURT: Mr. Salsini, I don't believe you raised your hand yesterday in reference to the question about having any conflict, did you?

MR. SALSINI: No.

THE COURT: The only thing I want to say to you before I turn you over to the lawyers is, to do what you're doing now which **[2241]** appears to be just leaning back and relaxing and answer these questions like you feel and don't worry about telling the lawyers something you think they want to hear. Just tell them how you feel about things.

* * * *

[2304] MARIE H. MAZZA,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Marie, I'm Paul Macaluso and this is Jim Nelson. When the trial itself actually begins, ma'am, we will be joined by Norman Kinne. He's not here, of course, right now, but he's another assistant district attorney like you and I. He will actually be presenting the evidence to the jury once it begins, the trial itself begins.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning. How are you?

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning.

Q You may recall that they are the defense attorneys who have been appointed by the Court to represent the Defendant. He's **[2305]** charged with capital murder, as you know, and his name is Thomas Joe Miller-El. He's at your very far right and you may be able to see him if you lean forward.

The reason why I've reintroduced every one, Marie, is because I want to reacquaint you with the roles all of us play and let you hear our names and then I would just like to ask you if you know or recognize any of us other than from the introductions on Monday?

A I know Mr. Cunningham.

Q You do?

A Two years ago I reported to jury duty and I spent a week and Mr. Cunningham was the defense attorney at that time.

Q Do you remember the case, what kind of case it was? Was it a criminal case?

A Yes, it was.

Q It involved a child; is that correct?

A Correct. I'm trying to think of the name of the accused. I'm not sure of the order, but it was Charles Ray or Ray Charles Woodard or Goodard.

[2306] Q Was it an injury to a child, is that what it was?

A Yes, it was.

Q You were on the jury for about a week?

A One week.

Q Let me just ask you this and this is really the only reason I'm asking you this question. Was there anything that occurred during that trial, whether it involved Mr. Cunningham or not, for that matter, that you feel would interfere with your service on this case at all?

A I don't feel that there would be anything.

Q Do you think he's the greatest lawyer of all times or the worse lawyer or he pleased you or offended you, I gather that wouldn't affect your service on this jury, right?

A I don't feel that it would affect anything.

Q As you well know, of course -- do you want me to call you Marie?

A That's fine, yes. I'm more **[2307]** relaxed with that.

Q That would be fine. That's the idea of all of this. You remember when you came down on that last jury, they talked to you in the presence of everybody else. When we talk about the death penalty and things like that, it can be a little bit inhibiting, I think. I've never been up there, but I can imagine it would not relax you too much to have forty or fifty people out there critiqueing every thing you say and quibbling over your position or whatever, so the law gives us the opportunity, in a capital case, to talk to you individually. Number one, the idea is to get you to relax, speak your mind, ask whatever questions you have and basically just tell us how you feel about some of these matters.

You know, as well as I do, that no one is going to quarrel with you or argue with you or try and change your mind even if we could, but if you have a question, then you ask it, all right? If there is something that you want to tell us, just go right ahead. You're not going to hurt anybody's feelings. If at any time we're not making ourselves clear, let **[2308]** us know and we'll repeat it, rephrase it, slow down or whatever it is. We kind of get running pretty fast at times.

As you well know, you are a prospective juror on this case and we're trying to find twelve -- well, we have three now, maybe only two. One has an illness problem or a health problem and we're a long way from that. We're trying to find the twelve people we feel would be the most fair, both sides would agree would be the most fair and qualified and suited to serve on this kind of a case.

Let me just tell you what our position is so you will understand where we stand at the outset. Just in fairness to you as we've told the other prospective jurors that we've talked to, Marie, we're actively seeking the death penalty in this case for Thomas Joe Miller-El. We're not making any apologies for it. We know that the law allows for it in these

types of cases and we intend to be able to provide this jury with the type and quality of evidence that we feel would convince them beyond any reasonable doubt whatsoever that **[2309]** Thomas Joe Miller-El is guilty of capital murder exactly as he has been charged. Then in the second part of the trial, once again, to provide the jury with the type and quality of evidence that would convince them that these questions -- two on this board and the third over there -- should be answered yes.

As you know, the result of three yes answers or all yes answers is a mandatory sentence of death. Basically that's what we're seeking based on the evidence that we intend to offer during the course of this trial. The only reason I tell you that, Marie, is to just let you know what our position is and what we intend and hope to be able to prove to this jury so that it wouldn't come as any surprise to anybody where we stand somewhere down the line. As you well know having been a juror before, it's up to the jury to decide those questions, you know, but we want you to know where we stand.

Now, you've been asked and given precious little time to respond the other day to these questions, the sixty or so different things there to consider. You were asked your **[2310]** feelings about the death penalty with a few minutes to reflect on it, of course. Now, you've had two or three days. Let me just ask you, Marie, to share with us in your own words how you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

A The question has never ever entered my mind before the other day. You know, you hear about things, the different cases and such and people going to -- you know, as death being the result. I guess I have never ever realized that that could ever be asked of me, to make that determination. In those other cases, I feel the citizens, my fellow citizens, have had to make that decision. It's not an easy one and I feel that it depends upon the case, the testimony. They

have to go from everything to make that decision. The choice they made was unanimously that they felt strongly that this was the decision that they felt they needed to make. It's kind of hard determining somebody's life, **[2311]** whether they live or die, but I feel that is something that is accepted in our courts now and it is something that -- a decision that I think I could make one way or the other.

Q You more or less feel it is a responsibility just like the other type of jury service you were on? No one, would disagree with you if you feel that it would be a weighty decision because obviously it would be a very weighty decision, a very, very important decision. Knowing yourself as you do, Marie, do you feel, if called upon and presented the type of facts, that you could make that decision that would ultimately result in the execution of Mr. Miller-El under the law?

A It's difficult, I know -- and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult.

Q Let me ask you. You mentioned your religious feelings and other factors that you've thought about for the last couple of **[2312]** days. Is there some sort of conflict that you may have?

A Not really. I don't think anything said to me one way or the other in my religious beliefs or my family upbringing, no, somebody could not be sentenced. I think it is in dealings with the other people that know me is what I've kind of been a little bit concerned about, being on this type of a trial.

Q Could you tell me a little more about that? I'm not quite sure I understand you.

A There is not everybody else who is for capital punishment.

MR. WEST: I'm sorry. I didn't hear that.

A Not everyone is for capital punishment and my communication with these people, I feel like right now I'm in a very respected position and I don't want to lose any respect although I feel, you know, I am a citizen and these are my decisions. I don't want it reflected on anything else. That's kind of what I have been more concerned about, what other people think than what I feel.

[2313] Q Has somebody criticized you for --

A No. No. It's just me looking at the whole realm of every thing. I'm kind of -I try to look at all sides.

Q You understand, Marie, if you're selected for this jury, I anticipate the Judge will -- well, first off, the decision -- you know, the lawyers agree to accept you for this particular jury, we want to accept the Marie Mazza that we see here today on the basis of what you tell us and naturally, if you were to go back to your business or your home or whatever and someone either speaks pro or con for the death penalty, that really wouldn't be fair to either side, would it, because -- and I think the Judge would probably instruct you that you're not to discuss that with anybody from this point on. We want you as we decide you to be and see you here today. Can you do that, in other words, not allow other people to talk to you about this from this point on?

A Oh, sure.

Q You don't feel you would be subjected to any kind of influence subtle or otherwise, do you, that would influence your **[2314]** verdict in this case, do you?

A I don't think there would be anything that would influence me.

Q How does your husband feel about the death penalty, if you know?

A It does not bother him. If that would be it, that would be it.

Q He could probably serve on this type of a jury himself then, couldn't he?

A Yes.

Q I never did get around to it, but do you view the death penalty as having a particular purpose or serving a purpose in our society, you know, a reason for having it in the first place?

A I think there's a reason for having it.

Q How do you perceive that, Marie?

A I feel that there are certain crimes that are committed that there are no excuses and repeated crimes that just -- you know -

Q They've got to stop sometime?

A That's right. There was no mercy for the person that they killed and therefore, **[2315]** you know -- but there are circumstances and things like that and the evidence and there are accidental things and that type of thing.

Q Let's talk a little bit about capital murder. We're going to cover quite a little bit of ground here, Marie, in the short period of time that we have because the Judge does have us on some designated limits. If I go too fast, you slow me down, all right. We're going to cover some ground here.

A Okay.

Q You now the law allows the death penalty as a possible penalty in only one type of offense, one category of offense and that is the offense of capital murder. You remember from what the Judge said that capital murder is different from murder. Murder is not first degree, second degree or third degree. Murder, under Texas laws, is just called that, murder. That's where one person knowingly or intentionally kills another or causes the death of another. That's done without any legal excuse or legal justification. There may be seat-of-the-pants justification for A killing B, but without any legal excuse like self-**[2316]** defense, accident, insanity, a crime of passion. There may be a myriad of other reasons why -- that mitigate or aggravate an offense of murder, but you can't receive the death penalty for murder. That's got five years to ninety-nine years or life. It's a very broad range. It's just like the range that you had on the case that you sat on before.

Now, murder become capital murder for which you can receive either a mandatory sentence of death or life if you commit murder as I've described it, but then you add something to it. It aggravates it basically, if you commit a murder of a police officer or a fireman in the line of duty, a jail guard, a murder for hire. I hire Jim to kill somebody, we both would be eligible for it, me for doing the hiring and him for doing the killing or a mass murder. That's a category now. Or the type we have here, Marie. That's where you commit murder in conjunction with, murder plus, another very serious felony offense, murder plus rape, murder plus robbery as we've alleged here. You murder someone while you're robbing **[2317]** them for whatever reason or you commit murder while you're burglarizing a home or commit an arson or kidnapping somebody and you end up murdering somebody. Can you see how just logically it aggravates murder, something that is already really bad into something that is just even worse? Would you go along with that, that the type of crime, capital murder that is, the ones I've designated so far, are the types that you feel the death penalty ought to be warranted under certain circumstances, like murder during a robbery and depending upon the facts individually? Do you feel like that's the type of crime where you feel the death penalty ought to be warranted?

A Again, it depends upon the facts.

Q In other words, you would say -- I imagine you would probably say, I don't believe that the death penalty should ever be warranted for theft. Do you see what I'm getting at, but it may be warranted for murder during a robbery, is that correct, depending upon the facts?

A Correct.

Q For the murder of one individual, **[2318]** I gather you feel the life of one individual would be important enough to merit or warrant the death penalty depending upon the facts? In other words, it wouldn't have to be a mass murder, would it?

A No.

Q Okay. Now, the trial of a capital murder case is conducted in two phases. The first phase deals solely with -- it's like the other trial -- whether a person is guilty, if he's proven guilty, or if he's found not guilty. It's just that simple. You know your oath as a juror, if you take that oath, is to a true verdict render according to the law and according to the evidence. It's just like before. If the State proves the elements of the indictment beyond a reasonable doubt, you find the Defendant guilty. You have a requirement and a responsibility to do that. If we fail to prove that, you have a responsibility to find the Defendant not guilty. Any problem with that at all?

A No.

Q As you know, if the Defendant is found not guilty, that's the end of the trial. **[2319]** If you find the Defendant guilty, you go on to the second phase of the trial where you decide what the penalty is going to be. In a capital murder trial, of course, you may hear additional testimony and then again you may not. You may be called upon to answer those three questions -- you may only actually receive two. It depends on the evidence. You may be called upon to answer those questions based on what you know about the offense itself. On the other hand, you may hear additional testimony in the second part of the trial from either side or both sides, but there is no requirement.

At the end of that phase of the trial, you go back with the other jurors and decide whether or not the State had proven to you beyond a reasonable doubt that those questions should be answered yes. In which case, just as your duty was to answer yes or find someone guilty in the first part of the trial, your duty would be to answer those questions yes. If we fail to prove that, your duty is to answer the questions no. Any questions about that, Marie? It's just that **[2320]** simple. Three yes answers equals death and the Judge has to do that by law. He has no power whatsoever to override your verdict. When you write in yes, yes, yes, you really might as well, with that last yes, write in death because that's the effect of your answers. The same as, if you

write one or, more no answers to those questions, the same thing would be life. The Judge can't -- if he disagrees with you, it doesn't matter. His course is required by law and is dictated by the answers that you give. Any questions about that at all?

A No.

Q Now, the questions are there, Marie. Why don't you take a moment to read those and then we'll talk about them.

A (Juror complies.)

Q Do you have any questions at all about any of those particular questions? Do they cause you any confusion?

A The third one.

Q Okay. That's the one that usually does. We'll talk about that in a minute. Bear in mind now, hypothetically -- let's forget about Thomas Joe Miller-El for a second and **[2321]** let's forget about this particular case and let's imagine that you're on a jury and you've found somebody guilty of capital murder because we proved it to you beyond a reasonable doubt. You've heard some more testimony, and maybe not any more testimony, but you've heard all of the evidence, whatever it may be, and you're back in the jury room now and, you've got these three questions and you've got to decide now whether the State has proven to you beyond a reasonable doubt that those questions should be answered yes. If not, the answers to the questions is no. Any question about the first one or any problem with that? I think that is simply asking you to look towards the conduct of the Defendant and decide whether he acted deliberately and with the reasonable expectation that someone was going to die. Marie, do you see how you could probably learn whatever you need to know to answer that question yes or no when you learn about the offense itself in the first part of the trial?

A Yes.

Q Do you see what I'm getting at; what the Defendant did; what role he had; how **[2322]** the crime itself was committed and what role he had in it?

A I think I could answer that.

Q Yes or no depending upon the evidence?

A Yes.

Q Number two, what do you think is being asked there, Marie in that question number two?

A Would he continue to do this if allowed to be out -- you know, to be free again.

Q A key word may be -- you may agree that the key word in that question may be, or a key word, probability. What does the word probability mean to you within that context?

A Probability like possibility.

Q Okay. Let's substitute that word. Is there a possibility that the Defendant would commit criminal acts of violence? Now, you notice that they didn't specify -- the legislature did not specify a particular offense, did they?

A Huh-uh.

Q They didn't say is there a **[2323]** possibility he will do this again, another capital murder, commit murder again, or rape or robbery or burglary. It says criminal acts of violence. You may agree or disagree that that phrase may be self-defining, you know, an act of violence of a criminal nature. Would you agree with me in that regard? You don't have to, of course. What comes to your mind?

A What were you saying?

Q Well, that phrase may be self-defining. It doesn't specify a particular offense, does it?

A No, it doesn't. To me, any criminal act would mean anything. It wouldn't have to be the same. It would be violating -

Q An assault, a robbery, a rape?

A Right.

Q Okay. Let me ask you, Marie, if you could tell us, if you can, what would you tell us that you would like to know about a defendant that I think would really enable me to answer that question best? What would you like to know about a person or have to know, let's put it that way, or feel you should know about somebody that would enable you to best **[2324]** answer that question yes? What would be the most telling thing or things to your way of thinking?

A I guess, you know, if I knew the history of the man, their upbringing, I would feel that has a lot of bearing on it.

Q Let me ask you, Marie, allowing that, I think, almost any event -- and human experience comes in three phases; what happened before, what happened during or what happened after, whether it be -- well, anything, including capital murder. Allowing if you were to learn, for example, in a hypothetical case -- we're not talking about Mr. Miller-El -- what preceded a particular crime, a capital murder? For example, what preparation, if any, occurred? Was it a spur of the moment thing or was it something that was planned to some degree? What role did a defendant have in that planning, was it active or passive? Do you see what I'm getting at? The designation of the victim and the location and so forth and so on and what about during the crime, did he have an active role or a passive role, was he a bystander like driving the get-away car or was **[2325]** he over there, you know, in the thick of it? How vicious and violent was it? Did he have to do it? Did he have to kill somebody or was there an alternative that he could have taken just as well? Then afterwards, how did he react afterwards? Was he nonchalant and blasé about it, another day at the office or was it a situation where he was contrite and remorseful and showed some regret? Do you see what I'm getting at? You get a panorama basically of the offense and you learn all the dynamics coming and going. Let me ask you, Marie, do you think you could learn enough about an individual when you learn all of that, for example, where you would say, yeah, beyond a reasonable doubt I think this is the type of person who probably or possibly is going to commit some criminal

act of violence in the future given the opportunity?' Do you think you could learn enough about an individual?

A You're talking about just through the trial?

A Yes, ma'am, when you learn all the dynamics of a criminal episode.

A If the evidence was strong enough.

[2326] Q You may be able to hear more. Don't get me wrong, but in which case you would answer the question yes. If you don't receive that type of evidence or whatever pleases you or satisfies you beyond a reasonable doubt, you answer the question no.

The third question you may or may not receive. That is conditioned on whether there is any evidence to raise that question. You can boil that question down, I think, to basically this question: Was this a provoked killing or was it an unprovoked killing? Do you see what I'm getting at? If you decide it was an unprovoked killing, you answer the question yes. If, based on the evidence, you decide there was some provocation, that the victim did or said something that ended up provoking the killing, then you decide was the killing reasonable or unreasonable -- not an excuse under the law, but was it reasonable in light of human experience or unreasonable? Do you see what I'm getting at? Then you answer the question yes or no on that basis. Any problem at all?

A I don't think there would be any **[2327]** problem.

Q Let's shift gears here, Marie, because we don't have a lot of time left and I want to cover something with you that I talked about earlier. I'm not suggesting that this would occur, but it is something that I do have to cover with you. Imagine for a moment that you're on a hypothetical capital murder jury. The State has alleged a capital murder that's a murder during a burglary -- a murder during a rape. You, along with the other jurors, are convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you have a reasonable doubt as to whether or not it occurred during a rape, or there was any testimony

about a rape. You're just not convinced. You understand that you couldn't find that defendant guilty of capital murder because we didn't prove both parts, did we?

A No.

Q We just proved the murder by itself, so you would have to find him not guilty of capital murder and find him guilty of what we did prove, which was what, murder. If that were to happen, you just divorce any **[2328]** thinking about mandatory life or death because that is not even a possibility, as I said earlier, for murder.

Now, we all know obviously that any kind of murder is a serious offense, but the law allows you in this particular situation here you've convicted somebody of murder the broadest of all ranges of penalty for any offense under the laws of the State of Texas, and the lowest range all the way to the highest. I think the reason, everyone will agree, is that it allows you to tailor the facts -- you, as a juror, to tailor the punishment to the facts once you hear the facts. Remember the old cliche, tailor the punishment or make the punishment fit the crime? The law allows you to do that. Marie, I think we've all lived long enough to know that there is a myriad, an infinite number, of circumstances under which one person can commit murder, kill another person. All bad, but some are worse, right? Would you agree with me on that?

A Yes.

Q All the law expects for you to be **[2329]** a qualified juror on a murder case is this --and I think you are this type of person: Number one, you are the type of person who will follow the law, respect the law and will follow it; number two, you're an open-minded person because you've said a number of times you would have to hear the facts in the case, wouldn't you?

A Yes.

Q And you're not going to jump to any conclusions or anything like that, are you?

A No.

Q That's all the law expects of you to be a qualified juror, is say I've got an open mind because I'm an open-minded person and I will follow the law, whatever it is, whether I agree with it or disagree with it, and I will wait until I've heard all the evidence and then I'll make a decision. The facts that I hear, if I think they're proper and called for and warrant and justify a minimum sentence, I'll live the minimum. If the facts call for, warrant and justify, after I've heard them, the maximum, I'll give the maximum. Can you do that, Marie?

[2330] A I think I can.

Q Okay. No one is suggesting that the minimum would be an easy thing to do or the maximum would be an easy thing to do. I'd like to think that it would take pretty unusual facts to give either one of them, you know real severe or real mitigated. But when they're called for, you could do that, I gather?

A Yes.

Q You know the range of penalty for murder is not less than five years in the Texas Department of Corrections nor more than ninety-nine years or life and an optional $10,000.00 fine and anywhere in between. I gather from what you're saying, Marie, just as you could consider the full range of penalty in that last case you were on, you could consider, in a proper case -- and that's when you decide it's proper -- after you've heard the facts, if you felt it was proper and warranted it and justified it, you could return a verdict of five years for murder, I gather?

A Yes.

Q Even though you understand that murder is where one person knowingly and **[2331]** intentionally causes the death, under a wide variety of circumstances you understand, of another individual, but there is no technical nor no legal justification, so don't be thinking about self-defense or accident or anything like that, if you believe that someone knowingly and intentionally killed someone. You get to hear

all the circumstances surrounding that before you make a decision.

The same thing would hold true for the upper range. If you heard a case that called for, warranted and justified ninety-nine years or life and a $10,000.00 fine, could you do that as well, if you felt it was proper?

A Yes.

Q In other words, you would just wait and hear all the facts, wouldn't you?

A Correct.

Q One or two other things here and then I'll let the other lawyers talk to you, Marie. Remember that the Judge talked to you about the testimony of one eyewitness to any offense? The law requires that the State, having the burden of proof as we do -- there's no question about that. We have every thing to **[2332]** prove and the Defendant has nothing to prove. While that's true, the law allows us to prove a case in a variety of ways; eyewitness testimony, for example, as the Judge said the other day. It could be the eyewitness testimony of one individual because many crimes only have one eyewitness. That may be the only evidence. Do you understand that? In other words, if you believe -- if you're on a jury and you hear the testimony of one eyewitness, whether it be for rape, murder, robbery or whatever the case may be, and you believed that one eyewitness beyond a reasonable doubt, the Law says you can base your verdict, a guilty verdict, on that testimony. Can you do that, Marie?

A I think I can.

Q If you're convinced beyond a reasonable doubt?

A Uh-huh.

Q You understand that we don't have to prove motive or premeditation in any type of a murder case. The law does not require that in Texas. Any problem with that at all?

A No.

[2333] Q One last thing, Marie, you understand whether a defendant testifies or doesn't testify, it's his deci-

sion entirely. He has nothing to prove. We've brought the charges against Thomas Joe Miller-El and the only burden, as the Judge said the other day, he has is to be here. We've done the accusing and the law says we must do all of the proving. He has nothing to prove, Marie. We're not quarreling with that. Don't think that I'm muttering under my breath or anything like that. He has nothing to prove and furthermore, he has nothing to disprove. Part and parcel of that, Marie, is, if he chooses to testify, that's fine. You listen to his testimony and gauge his testimony as you would any other witness. If he doesn't, that is his prerogative just as it would be yours or mind and jurors, such as yourself, as you well know -- I'm sure you got this instruction before -- cannot consider the failure of the Defendant or a defendant to testify as any circumstance of his guilty whatsoever. You can't hold that against him, in other words. you didn't hold it against the last defendant, **[2334]** did you? I don't know whether he testified or not, but you wouldn't have?

A No.

Q All right. Now, do you have any questions of me at all, Marie, at this point?

A I can't think of any.

Q Marie, it boils down to this, do you know of any reason-why, if we proved to you beyond a reasonable doubt all that is contained in this indictment -- do you know of any reason, ma'am, if we proved it to you beyond a reasonable doubt, why you would not find the Defendant guilty?

A I think I could find him guilty.

Q In other words, if we prove it to you, you will find him guilty?

A Yes.

Q Do you know of any reason why, if we proved to you that those three questions should be answered yes beyond a reasonable doubt, knowing that it would result in his execution, you could not answer those questions yes?

A No.

Q By the same token, if we fail to **[2335]** do either of those things, you could find him not guilty or answer the questions no?

A Yes.

Q You will just follow the law and let the law take its course?

A Yes.

Q You've been real polite, Marie, and I appreciate it. I know we've talked a lot and thrown a lot at you in a short period of time and I know you've given a lot of consideration to it and we appreciate that. I know the other lawyers do, too. That's all the questions I have.

MR. MACALUSO: I'll pass the venireman.

[2336] EXAMINATION

BY MR. CUNNINGHAM:

Q Good morning again. Mr. West and I were talking a few minutes ago about the astronomical figure in two years—this is your second time ever on a jury?

A Right.

Q Seeing me again as a defense attorney. What do you think the odds would be of that happening, one in twenty million?

A I don't know. I feel a lot of times I'm either in the right place at the right time or the wrong place at the wrong time.

Q I don't think anything happened in the case where I represented—I think it was Charles Ray Woodard. Nothing happened in that case that would prevent you from being a fair and impartial juror on this case?

A No.

Q I guess my third and last question is, you remind us—I notice that your favorite TV show is Cheers. You remind—as we sat here, you look just like—what is it, the psychology waitress on Cheers?

[2337] A Diane?

Q Diane. Anybody ever tell you that you look like Diane?

A Yeah.

Q You really do.

MR. CUNNINGHAM: No further questions Your Honor.

THE COURT: What says the State?

MR. MACALUSO: We would be pleased to accept Ms. Mazza as a juror on this case, Your Honor.

MR. CUNNINGHAM: You said what?

MR. MACALUSO: We would be pleased to accept her as a juror on this case.

MR. CUNNINGHAM: Welcome aboard the gang.

THE COURT: Ms. Mazza, I'm going to give you the oath that I've talked about and then I'm going to give you some instructions as Mr. Macaluso hinted at. Let me ask you to **[2338]** raise your hand, if you would?

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: We moved through your voir dire rather quickly, although we never know when we start talking to a juror whether a juror is going to be accepted or say something to get excused or be challenged. The lawyers on both sides obviously believe that you would be a good juror to both sides in this case which means, as we expect in all cases, that you will call it right down the middle just like Mr. Macaluso talked to you about.

It is obviously a serious case for both sides. The reason I'm saying that is, is to say this to you: I'm going to give you some instructions now which are always given in every case, but they're particularly critical here because, at the rate we're **[2339]** selecting jurors, it's difficult to predict when we might start testimony. The best—and it has to be a guess because we just never know. Hopefully, we might start as early as March the 10th or the week of March the 10th. I'm going to hopefully start on Monday just because it's more—we're used to starting cases on Monday and it's a

little easier to get geared up over a weekend and it would give us more time to notify the jury. It could run into the following week very easily. It just depends on how quickly we move in the next couple of weeks. This is our third week of voir dire and you are the third sworn juror that we have that is going to serve. We had four sworn and have had to excuse one for medical reasons, so you can see how slowly it's going.

The reason that I'm telling **[2340]** you all of that is, is to remind you that it is going to be another two or three weeks before you will be called back. During that time, I instruct you most particularly not to let anyone give you any kind of input about this case, factual, philosophical, moral or otherwise because, as Mr. Macaluso emphasized to you and he was only emphasizing what the law is, it's very important to you and the other eleven jurors who end up being selected in this case to make your decisions about the guilt or innocence of the Defendant and, if you find him guilty, what punishment to assess based on the evidence from the witness stand up here and what you feel and believe about the case. I know you won't do it, but if you got some outside information or somebody talked to you about what sentence might or might not **[2341]** be appropriate, you can see where that wouldn't be fair to this Defendant or it would be fair to the lawyers and it wouldn't be fair to the State, of course, because they're entitled to a fair trial just like the Defendant.

I give you these instructions that I just gave you. What we will do is call you with as much lead time as possible before you will be called back. I hope it, at least, will be a day or certainly a day and hopefully, at least, a couple of days or a weekend. Have you saved my little slip from the other day?

MS. MAZZA: Yes.

THE COURT: Why don't you hang onto it in the event that you need to call us for anything. We're glad to have you and I think you, obviously, are a very good juror. We've gone through—you're forty-six and we've only **[2342]** got

three jurors, so you can see how selective this process is. We'll see you soon, I hope.

(Whereupon, Ms. Mazza left the courtroom and the following proceedings were held.)

* * * *

[3260] KEVIN C. DUKE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Duke. As I was introduced on Monday, my name is Jim Nelson. I want to reacquaint you with everybody else who is sitting here. This is Paul Macaluso sitting next to me. Another man who will be involved in this for the State is a man by the name of Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district attorneys in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Mr. Duke?

MR. DUKE: Fine.

Q Next to him is Royce West.

MR. WEST: Mr. Duke, good morning.

[3261] Q These two gentlemen are attorneys in Dallas who have been appointed by Judge McDowell to handle the defense of Thomas Joe Miller-El, the man at the far end of the table in the light blue suit down there. As you know by this time, Mr. Miller-El is charged with the offense of capital murder. He's been indicted by the Dallas County Grand Jury for capital murder. That's the most serious offense that can be charged against any person in the State of Texas.

I was glancing through your questionnaire. I don't remember you being on any juries before; is that right?

A Right.

Q If you had been, we would have talked to you, in any other type of case, as a group kind of like you were seated Monday morning. We would talk to forty or fifty people at once and ask everyone some questions and go through it that way. In a capital case, the law allows us to talk to you individually. I guess because there are such strong feelings on both sides of some of the issues we need to talk about. The hope is that you will feel a [3262] little bit more comfortable talking to us individually than you would talking in front of forty or fifty other people.

I know if I'm in front of a group like that, I start worrying about what people think about what I have to say or how I'm saying it. We don't want you to worry about that. There are no right or wrong answers to anything I'm going to ask you or either of these gentlemen will ask you. We're just trying to find out how you feel about certain things.

Really all we ask of you, Mr. Duke, is that you relax as much as you can and be as open and honest with us as possible in talking about these things because what we're really trying to find out is how you feel. We've been at this for almost four weeks now and we have six jurors up to this point. We're halfway there, but you can see that it takes a while. The time we spend with you may seem a little tedious, but I hope you will bear with us and be patient with us because it is necessary so we will have the twelve people best suited to serve on this jury.

[3263] Let me just start out by telling you what our position is in this case. The three of us representing the State of Texas and the district attorney's office are actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel that we will be able to present to a jury of twelve people the type and qualify [sic] of evidence to allow them to convict him of capital murder and the type and qualify [sic] of evidence to allow them to answer three questions yes. If those three questions are answered yes, Judge McDowell

has no choice but to assess the death penalty in this case. That's exactly what Judge McDowell will do in that case.

We anticipate, if those three questions are answered yes, at a time prescribed by law Thomas Joe Miller-El, sitting right down there, will be executed by lethal injection. Now, that's our position and we will maintain that position throughout the trial, but what I'm more interested in is your feelings.

You filled out a questionnaire on Monday. One of the questions on there was **[3264]** about the death penalty, how you feel about the death penalty. You've had a little more time to sleep on it and think about it now. I'd like to ask you to tell us just in your own words whether you're in favor of or against the death penalty and whether you feel like you could serve on this type of jury or not?

A I think you have to have the death penalty. I think sometimes it should be up to the person who is convicted because, if he's sentenced to life imprisonment, sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I just as soon have it over with than be in prison for the rest of your life. If he's committed a crime like this that maybe he should be convicted of and put away, if he's not put away for life, that's—if he has no chance for parole, then I don't see the difference between death and life imprisonment. If there's a chance for parole, that's a different story, but I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to **[3265]** me.

Q You feel like the death sentence or the death penalty serves a purpose in our society, Mr. Duke?

A Yes, I sure do.

Q How would you put that purpose? How would you phrase that?

A It makes people think about it a little more than if you just—they don't treat it so lightly.

Q Do you know what I mean when I talk about deterrents, deterring someone from committing another crime?

A Right.

Q A lot of people come in here and have said that they felt it was a deterrent to crime. Like you say, other people that are thinking about doing this kind of thing, they're going to think twice about it.

A A lot of those people don't even think about it, though.

Q That may be. That may be. How long have you felt this way about the death penalty, Mr. Duke? Is this something you've just thought about recently or have you **[3266]** considered this for a while?

A I've considered it for a long time.

Q Have you ever felt differently about the death penalty?

A No. I've always believed in having the death penalty. I think it serves a purpose.

Q Okay. You're twenty-one; is that-right?

A Yes, sir.

Q Where are your parents?

A They're in Dallas.

Q Okay. Would you know how they feel about the death penalty?

A Yes.

Q How do they feel about it?

A That's where I get my feelings from, my father. That's the way my father feels about the death penalty. He doesn't like to see it happen. I mean, it's a sad thing to see, to have to kill someone, but they shouldn't have done the things that they did. Sometimes they deserve to be killed.

Q I think everyone would agree with **[3267]** you. We aren't going to have—we don't want twelve blood-thirsty jurors sitting over here on the jury.

A Right.

Q We want people that it's going to be a difficult decision to make.

A It's not an easy decision.

Q And it shouldn't be.

A It's someone's life here.

Q Let me talk to you a little bit more about the law generally in the State of Texas. What kinds of cases do you feel like the death penalty should be appropriate for?

A I think murder is the only thing, taking the life of another human being. I don't think anything else is worth—I mean, taking another life is the only thing that can be dealt with for another life.

Q The law in the State of Texas specifies one group of offenses where the death penalty is appropriate, offenses that are called capital murder.

A Murder in the process of another felony?

Q That's one. There are basically **[3268]** four different types of categories. One category is the killing of a certain group of persons like a police officer or a fireman on duty or a prison guard. The second type is murder for hire, if I hired somebody to kill somebody else. Both I and the person I hired could be prosecuted for capital murder. The third kind is mass murder like the incident at Ianni's a year or two ago. The fourth kind is the one you mentioned. We call it murder plus for lack of a better phrase. It's murder in the course of another offense like a burglary or an arson or a kidnapping or a rape.

What we've alleged in this case, Mr. Duke, is murder in the course of a robbery. Basically what our indictment says is that this Defendant did knowingly or intentionally cause the death of another individual. Now, that in and of itself is murder in the State of Texas. That's not a death penalty offense, just murder. We have to go further. The indictment further says that he caused that death while in the course of committing a robbery. We have to prove both of those things to you in order for him to be guilty of capital murder.

[3269] Now, the way that is basically done is, the trial is in two phases. After we get a jury selected, the first phase is what we call the guilt or innocence phase. It is during that period of time that we have to prove to you what is in this indictment. When I say "we", I'm talking about Mr. Kinne, Mr. Macaluso and myself. That's our job to prove it to you. As Thomas Joe Miller-El sits down there at that end of the counsel table, he's presumed to be innocent.

A Right.

Q If you were on a jury and right now had to go out and decide guilty or not guilty, you would have to say not guilty because we haven't proved it. Now, that doesn't mean that he didn't do it, but it means that we have to prove to you that he did it.

A Right.

Q There's an old saying down here, we did the accusing and we've got to do the proving and that's the way it works. We have to prove it to you beyond a reasonable doubt. If we do, it's your duty to find him guilty and, if we don't, it's your duty to find him **[3270]** not guilty.

Now, along with that presumption of innocence is the fact that he doesn't have to testify. As a matter of fact, nobody over at that table has to ever say a word.

A Right.

Q We may not hear a peep out of him through the whole trial, but if we don't prove our case to you beyond a reasonable doubt, you have to find him not guilty. They don't ever have to prove or disprove anything at any time.

Now, if the Defendant chooses not to testify, the jury cannot consider that in any way. The law doesn't even allow you to think about it because he has an absolute right—there could be fifty reasons why he didn't testify.

A Right.

Q Now, somebody might not be able to speak very well or all kinds of reasons why they wouldn't testify and you can't hold that against him and you can't consider it at

all in your deliberations. Do you have any problem with that?

A No.

[3271] Q Okay. If he does testify—and again, it's his option whether he wants to or not. If he does, we're going to ask you to listen to him and judge him as you would any other witness, judge his credibility like you could anybody else. We'll talk about that more in a little bit.

I told you the Grand Jury has indicted him for capital murder. This is a copy of that indictment. This indictment is absolutely no evidence of his guilt. We could put down in here—the Grand Jury can put anything in here that they want to put in. They can make it sound as horrible as you could ever dream, but it doesn't mean anything until we prove it in this courtroom beyond a reasonable doubt. That's what the guilt or innocence phase is about. That's when we have to prove—we have to prove, first of all, that this Defendant did knowingly or intentionally cause the death of another individual without any legal justification or legal excuse. In other words, it wasn't self-defense. It wasn't an accident and it wasn't anything like that. He just killed him.

[3272] Secondly, we have to prove that he that while in the course of committing or attempting to commit a robbery. If we prove that to you beyond a reasonable doubt, again it's your duty to find him guilty. If we fail to prove that beyond a reasonable doubt, it is your duty to find him not guilty. Do you think you would have any trouble with that?

A No, sir.

Q Okay. If he is found guilty of capital murder, the law says there are only two possible punishments, a life sentence—and that life sentence is the same as any other life sentence in Texas, subject to the same rules and regulations and procedures as any other life sentence—or the death penalty. Those are the only two choices.

Now, up until about thirteen years ago the way the jury did it is, they would listen to the evidence and they would go out and deliberate and decide life or death and they

would write on the jury form life or death and that's what it would be. The law was changed a little bit about twelve or thirteen years ago. Instead of the jury directly saying **[3273]** either life or death, the legislature said no, you have to answer questions based on the evidence and the answer to those questions will determine what happens.

If the three questions are answered yes, then Judge McDowell has absolutely no choice but to assess the death sentence. If he disagrees with what the jury did, that doesn't make any difference. If he has some questions about what the jury did, it doesn't make any difference. He must assess the death sentence.

By the same token, if one of those questions is answered no, he must assess that life sentence. Again, he has no options, no discretion. It's completely up to the jury. Can you see that even though you're not writing life or death, the effect is the same—

A Right.

Q —by answering those question? Now, the questions we're talking about are those three on the boards there. Why don't you take whatever time you need to read those over?

A (Juror complies.)

Q Have you had a chance to read them **[3274]** over?

A Yes.

Q Do you have any questions about them?

A Is the first one just basically saying that when he shot him, he knew he would be dead or he was trying to kill him not just injure him or shoot him in the kneecap or something like that?

Q I think probably that's looking towards the kind of thing, Mr. Duke, if I took a gun and pointed it at Mr. Macaluso's head and pulled the trigger, then it's pretty clear I expected him to die as a result of that. If I shot at his foot and the bullet bounced off the floor and the wall and the ceiling and came down and killed him, then there might be some

questions whether I reasonably expected him to die as a result of that or not.

A That's the way I understand it.

Q Okay. Now, those three questions are the same in every capital murder case. They're not special for this case. They're the same in every one. You, as a juror, if you're on this jury, may receive more evidence as the **[3275]** second phase of the trial or may not. We still have the burden of proof. We still have to prove to you beyond a reasonable doubt that those questions should be answered yes. If you have a reasonable doubt about any of them, it should be answered no. We may rely on the evidence from the guilt or innocence phase of the trial. We don't have to bring any more evidence, although we might. We don't have to although we keep the burden of proof. Again, they don't have to prove or disprove anything. They can, again, not utter a word and, if we don't prove to you those questions should be answered yes, then you should answer them no.

Now, we've talked about the first question. Let's look at the second question. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do you feel like they're asking there?

A If you think he would go out and kill again, not just kill but be a threat to society.

Q Okay. Would you agree with me **[3276]** that a key word there is probability?

A Right.

Q What does probability mean to you, Mr. Duke?

A That there is a likely chance that it will happen again.

Q Okay. When we were talking about criminal acts of violence, you said murder and robbery. It could be a rape?

A Right, any threat to society.

Q Even if I did something like taking a baseball bat to somebody's head?

A Uh-huh.

Q Would you agree with me that that's a criminal act of violence?

A Yeah, I sure would.

Q Okay. Now, as I said, you may hear more evidence on that question and you may not at the punishment phase. You may be asked to answer that question based on what you've heard about the facts of this particular case. For example, I guess we can divide almost any event into three stages; the time before the event, the time during the event, and the time afterwards. You may hear about things like **[3277]** what happened before. Was this planned? Was the person on trial involved in the planning or was he a bystander? Had he planned it for a long period of time or did he show up at the last minute? How was he involved?

Second, during the event how did he act? Was he a leader or was he a follower? Was he out there as a look-out or was he out there giving orders and pushing people around? Could he have done something less than what he did that wouldn't have been as violent or wouldn't have been as dangerous or did he have to do what he did?

Third, after the event how did he react? Was he sorry? Did he show remorse? Did he feel bad about the fact someone had died or was it just another day at the office, just slapping a fly, nothing to it?

Can you see how looking at those things you might be able to answer question number two up there?

A Yes, sir.

Q Can you also see how question number two can be answered either yes or no depending on what the evidence is?

[3278] A Right.

Q Okay. Question number three is one you may or you may not get depending on the evidence. Let's look at it for just a minute. "Was the conduct of the Defendant in killing the deceased unreasonable in response to provocation, if

any, by the deceased?" Now, basically, would you agree with me, that is asking, number one, if this was a provoked killing or an unprovoked killing?

A Right.

Q If it was an unprovoked killing, that question would have to be answered yes?

A Right.

Q If it was a provoked killing, you're going to have to make a decision whether the Defendant's actions were reasonable or not in response to that provocation. Do you have any questions about any of those now that we've had a chance to talk about them?

A No, sir.

Q Now, what we're going to ask you to do, Mr. Duke, is keep an open mind and listen to all of the evidence before you make a decision on those questions. If the evidence **[3279]** proves to you beyond a reasonable doubt that those should be answered yes, answer them yes. If we don't prove that to you, if you have a reasonable doubt, then you answer them no. Can you keep an open mind and listen to all of the evidence before making that decision?

A Yes, sir.

Q If question number three is not submitted to you, then the sentence will depend on your answers to questions one and two. If both of them are answered yes, it's the death penalty. If one or the other or both of them are answered no, then it's a life sentence. Have I made myself clear about that?

A Yes, sir.

Q Now, there is something that may come up. We don't anticipate that it will, but it might so we need to talk about it for a couple of minutes. I told you that we call this type of capital murder plus. Let's look at a case—let's not use this one. Let's use a murder in the course of a burglary, for example, and you're sitting on the jury and we present evidence to you that shows you that the defendant killing a

person, knowingly or **[3280]** intentionally caused his death, but you don't hear anything about a burglary. Now, we haven't proved capital murder to you, have we?

A No.

Q We've proved murder. I think I told you earlier that has a different range of punishment in the State of Texas. The death penalty is no longer an issue. The range of punishment for the offense of murder in Texas is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. In order for you to be qualified to serve as a juror, you have to be able to consider the entire range of punishment for the offense of murder.

We use the phrase "able to consider". That's a legal phrase and let me see if I can explain that a little bit. You don't have to be able to sit there right now and tell us you will give somebody life or tell us you'll give somebody five years anymore than you can sit there and tell us you will give somebody the death penalty because you don't know the facts and we can't tell you the facts at this time. The law doesn't allow us to. **[3281]** When we say able to consider, basically what we mean is this: After you've heard all of the facts and circumstances you're going to hear, all of the evidence in the case, the facts about this offense, anything about the person on trial that you're ever going to know, after you've heard all of it, if you believe based on all of that that the proper sentence is ninety-nine years or life, could you give ninety-nine years or life for the offense of murder?

A You're saying you've proven that he's committed the murder?

Q Okay. Let me make that clear because I've kind of jumped over it a little bit. Murder in Texas is knowingly or intentionally killing another human being without any legal justification and without any legal excuse. In other words, if it's self-defense, then the person is not guilty. If it is an accident, the person is not guilty. If the person who did it is insane, they're not guilty. If it's a killing in the heat of passion, somebody raped my four year old little girl and I found out who did it and he was standing two houses down laugh-

ing and telling **[3282]** everybody about it, and I went down and killed him, that would be killing in the heat of passion. That's not murder, either. That's what is called voluntary manslaughter.

A Right.

Q So when we talk about murder, we're talking about knowingly or intentionally killing another human being. They decided to do it, knew they were going to do it and did it. Are you with me so far?

A Yes.

Q Now, would you agree with me that there can be hundreds and maybe thousands of different situations where one person could kill another person?

A Right.

Q I'm not even allowed to give you examples of what some of those situations might be, but there could be provocation from the person who got killed that wouldn't amount to self-defense, but might affect why the killing occurred, all kinds of—the prior relationship of the parties, you could hear about that, if they had trouble before, if they were fighting or something. You can hear all **[3283]** the surrounding facts and circumstances in a murder. In other words, you can know everything about the murder and you will probably get some information about the person who committed the murder.

If you found somebody guilty of the offense of murder, the law says that the range of punishment, which is the widest in the State of Texas, is anywhere from five years up to ninety-nine years or life. Now, I think, it's probably to take into account the hundreds or thousands of different fact situations where a murder could occur. We talked about it like knowingly or intentionally caused the death of another individual without any legal justification or without any legal excuse. Well, that's what murder is, but a lot of things can enter into that. It's still a murder, but a lot of circumstances can come into it, so what the law says is, after you have heard all of the facts and circumstances relating to that case

and to that defendant, then you have to make a decision on what the punishment should be.

Obviously since the legislature **[3284]** has set that wide range of punishment, we can't have jurors who have their minds closed completely to one end or the other. You don't even have to be able to sit there right now and think of a set of circumstances where you would give five years or where you would give ninety-nine years. What you have to be able to tell us is that you will listen to all the facts and all the evidence and keep an open mind and, after hearing all the facts and all the evidence, everything you're going to hear, if you believe that it's a proper case based on those facts and circumstances for a life sentence, would you give a life sentence?

A Yes, I would.

Q Let's go to the other end. Again, you've heard all the facts and all the circumstances, everything that enters into it. If you've heard everything and after hearing all that, you believe in your mind that this is a proper case that calls for a five year sentence, can you give a five year sentence?

A Yes, sir.

Q Okay. For the offense of murder, is there any problem with that?

[3285] A No.

Q Again, I want to emphasize that you don't have to be able to sit there right now and think of a set of circumstances where you would give five years. All you have to tell us is, if you hear that set of circumstances, whatever it may take—you may not be able to tell us what it would take, but if you hear it, you can say, well, this is that one case in a million that calls for five years and I'll give five years?

A I'd have to know what happened.

Q Right.

A If I could give from five to ninety-nine.

Q If you thought it deserved five years, you could give five years and, if you thought it deserved ninety-nine years, you could give ninety-nine?

A Yes, sir.

Q If you thought it deserved twenty-three point seven eight years, you could give twenty-three point seven eight years?

A Yes.

Q Or anything in between?

[3286] A Yes, sir.

Q Any problem with that at all?

A No.

Q Now, there's one other instruction that you may be given with reference to that. It basically says—and I've got a copy of it here in my hand. I'm not going to read the whole thing because it's kind of long. It says that a defendant may earn time off the sentence imposed through good conduct time. It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the aware of parole. It says it cannot accurately be predicted how the parole law and the good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment because the application of these laws depends on decisions made by the prison and parole authorities.

What that is saying is, good time exists and parole exists, but we don't know how it's going to be applied because that's up to the Board of Pardons and Paroles and up to the governor.

A Right.

[3287] Q Then it further says that you're not to consider the extent to which good conduct time may be awarded or forfeited by this particular defendant. You're not to consider the manner in which the parole law may be applied in this case. They're telling you it's there and they're telling you you can't consider it.

A Can't consider it.

Q I'm not quite sure why that's in there, but that's an instruction you may receive.

A So if we say five years and he gets off in a year, we can't consider that, if he has a chance for parole?

Q You can't adjust the time for that. Now, one further thing that statute says is, if it's a six year sentence or less, they have to serve a calendar two years. The bottom line is, all that's there, but you can't consider it. If you see a case that calls for five years, the law requires you to give five years. If you see a case that calls for twelve years, the law requires that you give twelve years and not adjust that one way or the other **[3288]** because of the parole law. Do you have any problems with that?

A No, sir.

Q I guess putting it into an example, say ten years and you wanted him to serve eight or twelve years if you wanted him to serve nine or whatever it is. You give him what you feel the case calls for.

A You consider how many years you're giving and not what could happen?

Q Right. Exactly. So you don't have any problem with that range of punishment at all; is that right?

A No, sir.

Q Just a couple more things real quickly. I think the Judge told you on Monday that the State does not have to prove motive for a murder and the State does not have to prove premeditation for a murder. Do you have any problem with that?

A No, sir.

Q You wouldn't require us to prove those. You may hear evidence about them.

A What has to be proven?

Q What has to be proven is what I **[3289]** told you is in the indictment, that he knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did so while in the course of a robbery.

That's what we have to prove to you. You may hear evidence on what the motive is or you may hear evidence that it was premeditated and you may want to take some of that into account in answering those questions, but we don't have to prove it to you for you to find him guilty of capital murder. Do you have any problem with that?

A No, sir.

Q I talked to you a little bit about credibility of witnesses. The law allows us to prove a case with the testimony of one eyewitness if you believe that eyewitness beyond a reasonable doubt as to everything in that indictment. Could you base a verdict on the testimony of one eyewitness?

A Yes, sir.

Q If you believed him—

A If I believed, right.

Q —you would render a guilty verdict and, if you don't believe him, then **[3290]** it's a not guilty verdict, or if you have a reasonable doubt. Any problem with that?

A No, sir.

Q On the credibility of witnesses, Mr. Duke, I guess it's kind of like a race. Everybody starts out at the same place and as they testify and you listen to them, some are going to go ahead and be more believable, some are going to fall back and not be so believable for one reason or another. You can't start somebody out ahead just because they're a priest or just because they're a minister or a doctor or something. You can't start somebody out behind just because they're a ditch digger or something like that. Everybody starts out at the same point.

A Right.

Q Then you listen to them and make your decision on their testimony as you're listening to them. You can't believe them just because of what they do for a living or just because of who they are. Do you have any problem with that?

A No, sir.

Q I've been talking to you for about **[3291]** thirty minutes now and I haven't given you a whole lot of time to talk, so let me just turn the tables for a second and ask you if you have any questions for me?

A I think I understand what you're asking. I don't really have any questions that I know of. I guess I can't ask you the questions I want to ask.

Q Well, we can't go into the facts of the case, if that's what you're wondering about. We can't tell you that now.

A How are you going to prove all of this?

Q We can't tell you that, either.

A The things I want to know, I can't ask.

Q Well, that's why you can't make a decision on guilty or not guilty or the sentence until you've heard the evidence.

A Right.

Q Because we have to prove it to you.

A Right.

Q That's what we're asking you to do, is keep an open mind and listen to **[3292]** everything before you make your decision. Do you have any problem with that at all?

A No, sir.

Q Mr. Duke, I'm out of time. I'm not going to bother you any more. I appreciate your patience with me and answering my questions as openly as you have. Thank you very much.

MR. NELSON: Your Honor, we'll pass the prospective juror.

EXAMINATION

[3293] BY MR. WEST:

Q Mr. Duke, as Mr. Nelson indicated my name is Royce West and, along with Mr. Cunningham, we represent Thomas Joe Miller-El who the State has charged with the offense of capital murder. He's the citizen accused of this particular offense. Now, let me say this before we start off with some questions and responses. I'm not prying into your

background. I'm not trying to be funny when I ask you these various questions. The only reason that I'll be asking you questions is because I need to find out as much about you as I can so we can intelligently decide whether or not you're qualified to serve on this jury. Fair enough?

A Yes, sir.

Q If you don't understand my question, just let me know. What high school did you graduate from?

A Nimitz High School in Irving.

Q Were you living in Irving at the time or what?

A Yes, sir.

[3294] Q You no longer live there?

A No, sir.

Q Do your parents still live there?

A They live in Dallas.

Q But that part of Dallas was in the Irving Independent School District or something?

A My parents are divorced. I lived with my mother when I was in high school. My father lives in Dallas now. My mother lives in Dallas, too, but they don't live together.

Q Okay. Do you live with one of your parents?

A No, sir. I live in an apartment with two other roommates.

Q What do your other roommates do?

A They both work at the same company I do.

Q That's with Summers Electric?

A Summers Electric is a wholesale electrical supply company.

Q You've worked for them for the past two years?

A Yes, sir.

Q How long have you been away from **[3295]** home?

A Four years.

Q Now, you indicated on your data sheet that you went to Texas A&M?

A Yes, sir.

Q You were there for two years?

A Yes, sir.

Q Was that on a scholarship or something?

A It was partial academic scholarship and my father paid for the rest.

Q Why did you leave Texas A&M?

A Well, Braniff went bankrupt and my father couldn't afford it any more.

Q I'm sorry?

A Braniff Airlines went bankrupt and my father worked for Braniff and we couldn't afford the school any more after that.

Q Why didn't you go to some other school?

A I was going to A&M and when Braniff went bankrupt, I didn't want to go anywhere else and besides that, I needed to go to work because my father couldn't afford to support me, actually.

[3296] Q Now, do you have any other brothers and sisters?

A I have one brother.

Q How old is he?

A He's twenty-three.

Q Did he go to A&M, also?

A No, sir.

Q What is he doing now?

A He lives in Denver, Colorado. He's a banker.

Q You indicated also as far as some of your hobbies or interests sports. What particular sport?

A I played football for twelve years.

Q At Nimitz?

A Yeah, since I was seven years old.

Q What position did you play?

A Middle linebacker and tight end.

Q While playing football in high school, did you receive any honors?

A Just like district, all district and all city and got awards in high school. Nothing major.

Q What years did you play for **[3297]** Nimitz?

A '78 to '82.

Q Did you have any scholarship offers?

A No, sir. I had a ruptured liver playing football, so that ruined my scholarships.

Q You also indicated skiing, watching sports, and being lazy.

A That's something I never get to do and that's what I like to do.

Q Do you hunt?

A Yes, sir.

Q What type of hunting do you do?

A Deer hunting and duck hunting. That's basically the two that I do.

Q What type of weapons do you normally use?

A It's a thirty ought six rifle and a shotgun.

Q Okay. How familiar are you with weapons?

A I just know how to use them. I'm not real familiar with all the different type of weaponry. I know how to hunt.

[3298] Q How long have you been hunting?

A Three or four years.

Q Have you ever seen—I guess, it would be a fair statement to say that you've seen an animal die before?

A Yes, sir.

Q Have you ever seen a human being die before, a human die?

A No, sir.

Q What is it that you liked about Rocky?

A A lot of enthusiasm for life, a lot of motivation.

Q Have you used that as a source of motivation in your life?

A Sometimes, yeah. I work out some and sometimes I listen to a Rocky tape just for a motivation to work out.

Q When you say "workout", are you talking about on weights or what?

A Lift weights and run or whatever.

Q How often do you do that?

A I used to do it all the time, but I had surgery on my thumb two months ago, so I've just started doing it this last week and I **[3299]** do it every day now.

Q Have you seen all four Rocky films?

A I've seen two of them. I haven't seen them all.

Q What about the Cosby Show. What do you like about that?

A It's funny. It's real fun. Cosby can make you laugh without cussing. He's the only comedian. I went and saw him in concert and Eddie Murphy and all them have to cuss all the time and Cosby never says one cuss word and he'll make you laugh harder than anybody.

Q You saw him the last time he was here in Dallas?

A Yes, sir.

Q Now, question forty-six, have you ever been interested in a criminal case in Dallas County and you said yes and it was the Jeter case. "The Jeter trial because they said he was guilty just because he was black." Would you care to elaborate on that?

A That was a big do with my grandfather. My grandfather is from Pennsylvania and he was down here during that **[3300]** time and my aunt lives out in Greenville, so they were all involved in the case and I got to hear about it every day. I don't read the newspaper that much because I basically don't have time to do it. I'm always working or doing something and I never have time to sit down and read or watch the news, so I get a lot of my information from my

parents in talking to them. My grandpa was all upset about that case and that's all we heard about for weeks, was him talking about the Jeter case.

Q What was he saying about it?

A He thought it was a bunch of rednecks out in Greenville. He's from Pennsylvania and he was saying it was a bunch of rednecks out in Greenville who decided to hang someone.

Q Decided to do what?

A Just to hang somebody, to pin the crime on Jeter because they couldn't find anyone else that did it. They couldn't find the person and they wanted to close the case and they just hung it on Jeter.

Q What did your aunt have to say about that, the one that lives in Greenville?

[3301] A I don't remember what she had to say.

Q Did she agree with him or what?

A I don't think she cared either way. She didn't really listen to it. My uncle agreed with him. He lives in Greenville, too, and he agreed with him. He thought it wasn't right. Everybody thought he was innocent and I guess from watching Sixty Minutes and all that, that I got the same opinion of it, too. He was framed for it.

Q Did you form any type of opinions concerning the criminal justice system and blacks?

A I think it's just one case. I don't think it's something that happens all the time. I think that was one case. I view it as one individual case.

Q Anything else you want to say about that?

A No.

Q Are there certain strong beliefs that you've had in your life, that no matter what anybody else says you believe in what you believe and that's it?

[3302] A. Yes.

Q Such as? Tell me some of these strong beliefs that you've had in your life that no one can change.

A I believe in God. No one can change that. I don't like gays. I'll be open and tell you that I don't. I could lie and say it doesn't matter, but I don't like them. If my son was gay, I wouldn't like it very much at all. I'm fixing to get married and I've been having to discuss that fact, what I would do if he was. I'm very strong about my family. If something happens to my family, it's very important to me no matter what.

Q Let me ask you this: What are your feelings about abortion?

A I believe it depends on the matter and the circumstances. I don't have an opinion one way or the other on abortion. I think in some instances, it's good and in some, it's not.

Q You just can't go through the whole litany of personal beliefs that you have, but there are certain things that you do believe strongly and as such, they're **[3303]** unalterable in your mind; is that correct?

A Yes, sir.

Q Let's kind of talk about—let me ask you this question: Do you know any of the participants in this trial? Do you know any of us personally or by reputation or anything?

A No, sir, I sure don't.

Q Now, let's talk about the death penalty. Your response to the question was that, yes, I do believe in the death penalty. It would be better to me than life in prison because that is dying every day. How strong are you on the death penalty? Is that a strong belief of yours?

A I believe it depends on the circumstances. It's not something to me that has to be done. I have mixed emotions about it because I feel that it really should be up to him whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty, you know. If I was up for murder, I would want to be the one to make that decision. I

know what I would do. I would rather die than be in prison for the rest of my life, being a useless human being.

[3304] Q But you could, if the facts called for it, assess it?

A If I could answer yes to all three of these questions, yes, I could.

Q Now, what offenses do you personally believe—and when we talk about personal beliefs henceforth, I'm talking about personal beliefs that are unalterable. What offense do you believe should be punishable by the death penalty, if any?

A Murder.

Q And you personally believe that and that's unalterable; is that correct?

A If anything. I wouldn't say that every murder should have the death penalty. I'm saying that taking another human being's life is the only thing that I would give the death penalty for.

Q Now, understanding that that's the only type of crime that you would give the death penalty for, how strong do you feel about that?

A Well, I can't say that—I'm not the kind of person to make a decision saying, if you murder someone, it should be the death **[3305]** penalty. I believe I would have to see the circumstances on each individual situation. I don't judge things as a whole. I judge things on their individual—what the circumstances are for a certain case. I'm not going to say no matter what someone did, they should be put to death. I can't say that and I can't say that I'm not going to say that he shouldn't be put to death no matter what he did. If I feel that I can answer all three of these questions yes and I feel that he's done a crime worthy of the death penalty, yes, I will give the death penalty.

Q If you feel as though the State has not proved that he is guilty, you can say not guilty?

A Right, definitely.

Q If the State does not prove each one of those questions beyond a reasonable doubt, you can say no?

A Yes.

Q And not be affected by how other people feel about it?

A No. It doesn't matter what anyone else feels about it.

[3306] Q Would it be a fair statement to say that you're an individual thinker?

A Definitely. I raised myself.

Q I'm sorry?

A I say, I feel like I've raised myself most of my life.

Q So you've had to make decisions in your life all along?

A My parents were divorced and my mother was not a very good mother. I'll put it that way. I've made most of my decisions in my life

Q Let's turn to these questions. You've already read the questions?

A Yes, sir.

Q I want to focus in on number two. The State has asked you what type of evidence you would need to answer that question yes?

A Excuse me?

Q I believe the State asked you what type of evidence you would need in order to answer that question yes? I believe that's what it was.

A What type of evidence I would need?

[3307] Q Yes. My question to you is, what type of evidence would you like to hear in order to answer it no, if any?

A I guess the only thing would be—well, it's hard to say what would make me say no. If he didn't really know what he was doing—but it wouldn't be murder if he wasn't

doing it intentionally, knowingly and intentionally like you said.

Q Right.

A I would have to say no.

Q Well, you wouldn't even get to that point.

A Yeah, I wouldn't get to that.

Q Let me ask you this: As Mr. Nelson has indicated, question number two deals with probability, being able to predict future behavior and make a determination as to whether or not a person is going to be a continuing threat to society.

A I feel, if he can commit a murder and not have any feelings about it at all, it doesn't bother him, like he said, swatting a fly, no big deal, then I think it doesn't matter. He's going to do it again.

[3308] Q So you believe as though, if you had convicted a person of capital murder, that would be sufficient for you in order to answer that question; is that what you're saying?

A Well, there would have to be evidence saying—that I would feel he would do this again or be a threat to society in some other way or form. I'm not saying just because I feel that he murdered someone and he was in the process of a robbery and he's guilty of capital murder that he would do it again.

Q You would have to have some evidence to show that?

A To show that he would do it again.

Q Now, if the law was such that it indicated that the State did not have to bring you any additional evidence, would you require them to bring you more evidence in order to answer that question? Let me back up. If all the evidence that you had was given to you in the guilt or innocence phase of the trial and the State didn't introduce any further evidence, would you require them to introduce further evidence in order to answer that question?

[3309] A Question two?

Q Yes, sir.

A If there wasn't any evidence about it, I would—probably, yes.

Q I'm sorry?

A Yes. If there wasn't any evidence showing that this wasn't just a one-time deal, that's all they could show, that this is just a one-time thing, it happened out of some other reason, you can't prove anything—that he would do it again or if he was that type of person or whatever, I would like to have more evidence to be able to make my decision.

Q Would you require more evidence?

A I'm not familiar with the law.

Q That's what I'm asking you. I'm just asking you, would you require more evidence in order to make a decision?

A In my mind, yes.

Q If the law indicated that the State didn't have to bring you any more evidence and that a jury could base its verdict or base its answer to question number two on the evidence that was presented during the guilt or innocence phase, would you be able to **[3310]** follow that law?

A I would have to. I would have to make my decision from that.

Q Would you just make it based on that evidence?

A If I don't have a choice and I have to make a decision.

Q The thing is, you have an option as to whether or not to take the oath in this particular case. The oath is that a true verdict render based on the law and the evidence. Now, as I think all the lawyers would tell you, a person is not expected to give up any kind of personal beliefs just to sit on the jury. They have an option, but the law does dictate that, if a person has a personal belief, they be able to set that personal belief aside and follow the law.

A Right.

Q Are you telling us that you would be able to set any type of personal belief aside and follow the law as given to you by the Court?

A Yes, sir.

Q Let me kind of go back around to **[3311]** where we kind of started from. The range of punishment for murder has been set by law. If you were governor for a day, what would you set the maximum for a case of murder at? Before you answer the question, how do you define murder? What do you think murder is?

A Taking the life of another human being.

Q Just taking the life of another human being?

A Well, murder to me is knowingly taking the life of another human being. If you know in your mind you're not insane, not you're not doing it out of the heat of a moment. Sometimes doing it out of the heat of the moment is murder, to me, too, because sometimes there is too many excuses for murder. Sometimes, to me, there are too many excuses for murder.

Q You're pretty close on the same definition as the law. Murder is knowingly or intentionally taking the life of someone else without any legal justification or legal excuse. If a person takes another person's life in the heat of the moment as you just **[3312]** indicated, it's not murder.

A That's one that would be hard for me to decide.

Q All right, but it's not murder. That's what the law says. If a person takes someone else's life after there has been some sort of provocation, it may very well be self-defense, okay?

A Right.

Q If a person knowingly and intentionally takes someone's life, but they're insane, then that's a legal excuse, insanity.

A Right.

Q The man that shot at the president, Hinckley, insanity.

A Right.

Q Thus the person wouldn't be guilty of murder.

A Right.

Q I'm talking about a situation where a person knew that he was going to do it. He intentionally did it and he did take the life of someone else. If you were governor for the day, what would you set the maximum penalty for that case?

[3313] A I'd say the death penalty is the maximum.

Q What would you set the minimum to be?

A For just murder by itself?

Q Right, just murder. He knew he was going to do it. He intentionally did it and he did it.

A I would say five years with no parole to that.

Q You would say five years with no parole?

A Yeah. If you murder someone, you need the time to think about it. If you're going to go back into society, I think you need time to adjust before you go back into society.

Q Let me ask you this: The minimum in the State of Texas is five years.

A With parole.

Q With parole. Now, the law is, if a person is sentenced to six years or less, they have to serve at least two years before they're eligible for parole.

A Right.

Q How do you feel about that law?

[3314] A I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it.

Q What about in a case of murder?

A I believe in forgiving. They can change. If they're the same human being and they're just going to go out and murder someone again, there's no way. If they go out and murder someone again, you know, that's not good for society to put them in jail for two years and then let them go and they do it again. If someone can change—someone can

change their mind about things and see what they've done and change their life and come out in two years and be a responsible human being, I believe in that. I would definitely like the parole board or whoever let's these people out to definitely know what they're talking about before they let them out.

Q You're telling both sides that you could consider the full range of punishment in this case; is that correct?

A Yes, sir.

Q And you could listen to the facts **[3315]** and circumstances in a murder case and, if you believed that the facts and circumstances called for it, you could consider and, in a proper case, assess the minimum of five years irrespective of the parole law?

A Yes, sir.

Q As the Court indicated and I think Mr. Nelson indicated, you would not consider the parole law in setting the punishment?

A No. I have to trust the parole board and hope that they know their business.

Q And likewise, you can consider and, under the proper facts and circumstances, assess life?

A Definitely.

Q One other thing I want to cover with you because I want to make sure that you understand this. The State has the burden of proof.

A Right.

Q The State has the burden of proof. Their burden of proof is beyond a reasonable doubt.

A Yes, sir.

Q If I were to ask you at this point **[3316]** in time to render a verdict in this particular case, what would your verdict be?

A He has to be innocent. I don't know this man from you.

Q That's exactly right.

A I don't know if he's on trial or you're on trial.

Q Or Mr. Nelson or Mr. Macaluso or anybody else?

A Anybody in this room could be on trial as far as I know.

Q Exactly, because the State has the burden of proof.

A Right.

Q Their burden of proof is beyond a reasonable doubt. You're going to have to judge the credibility of their testimony. Let me ask you this one question: Have you ever had a situation where you had to make a determination as to who was telling the truth and who was telling a lie?

A Yes, sir.

Q That's a common experience; is it not?

A Yes.

[3317] Q Have you ever had a situation where one person was saying that the other person did it and you had to make a determination as to who was telling the truth?

A Right.

Q A common everyday experience; is that correct?

A Yes.

Q If you're called upon to assess credibility in situations like that, can you do that?

A Yes, sir.

Q The State has the burden of proof and I want you to remember that.

A Yes, sir.

Q Do you have any questions of me at all?

A No, sir.

MR. WEST: I'll pass.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: Just a moment, Your Honor. Your Honor, the State would be pleased to accept Mr. Duke as a juror on this case.

[3318] MR. CUNNINGHAM: Your Honor, may we have a few minutes?

THE COURT: You bet.

MR. WEST: The defense will accept the linebacker from Nimitz High School.

THE COURT: Let me ask you to raise your hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: Mr. Duke, let me just give you some additional instructions. You've been sworn as one of the jurors in this case and I think, as Mr. West told you, you're only number seven. We're making pretty good progress, but you are number seven and we're still five jurors away from having twelve. We hope to complete the jury selection this week and next week, if we're lucky, which means we'll probably start the case about March 10th. We may not start on that date. It may be in [3319] the middle or later that week or even the following week, but we would call you, as we will all the jurors, with enough lead time to get you down here, at least overnight and hopefully a couple of days.

During the time between now and then, I think it is really important that I remind you of instructions, and I'll give them to you again, about letting anyone discuss this case with you or discuss it with anyone. You made the statement on your own that you're an independent person and I believe that from listening to you talk for over an hour now. I think you would agree with me that it wouldn't be right and it wouldn't be fair to the State or this Defendant for anyone outside of the witness stand, where you will get your evidence, and the instructions that I give you, to [3320] give you any kind of input about this case. I don't believe that will happen, but I want to impress on you, if someone tries to talk to you about this, just tell them that you cannot and will not because the Judge has instructed you not to.

The final thing I want to leave you with is this: I'm not trying to make you—I just want you to know how important you are to this process. We've talked to—you're juror number seventy-eight and we've only got seven jurors including

yourself, so you can see—we haven't talked to that many, but we've gone through seventy-eight jurors. This is our fourth week and we have talked to many of those people just as carefully as we have you. The fact that you were accepted by both sides indicates to these lawyers that both sides believe [3321] you will do that. You've taken your oath and you will follow your oath. You've impressed me as being able and willing and capable of doing that and I don't think or have any doubt otherwise, so I just want you to go away knowing that when you come back down here, all both sides are going to do is ask you to take that oath and follow it. I think you will. Good luck to you. Thank you.

(Whereupon, this caused was recessed to 1:00 P.M., at which time the following proceedings were held.)

THE COURT: Mr. Macaluso, are you ready?

* * * *

[3837] TROY WOODS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Woods. Let me begin by reintroducing everybody here. I'm Paul Macaluso. This is Jim Nelson and we're the lawyers for the State. We work for the district attorney's office and we're representing the State of Texas and Dallas County in this case.

Next to Mr. Nelson is -Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Woods?

MR. WOODS: Fine. How are you?

Q And next to Mr. Cunningham is Mr. Royce West.

MR. WEST: Mr. Woods, good afternoon.

Q They're the defense attorneys. [3838] They're defending the man who is charged with capital murder. He is

the Defendant and his name is Thomas Joe Miller-El. He is at your very far right, Mr. Woods. You're tall enough. I think you may be able to see him from where you are. Do you see him down there? That's the Defendant and he is charged with capital murder which, as you know, is the most serious offense under the laws of this state. It's serious because of the type of offense it involves, capital murder, and it's also serious because it carries the two most serious types of penalties under the laws of this state. One is a sentence of death and the other is a possible sentence of life. These are things that the judge discussed with you the other day.

I'm trying to remember if you have been down here on jury duty before.

A No.

Q You have not served on a jury before?

A No, sir.

Q Ordinarily, Mr. Woods, if you came down here for any other type of case, you would **[3839]** be interviewed by the lawyers. The lawyers would talk to you, but we would ask you questions as you sat out there like you did on Monday with all the other people. We would ask you four or five or six questions and so forth and so on. The law allows us in this type of a case only to talk to you individually as we're doing now. It's kind of private here now, isn't it?

A Yes, it is.

Q It's a lot more private than it was yesterday. I think the idea behind that is, because the death penalty is involved in this case, so you can be as relaxed as you can possibly be without having a bunch of strangers around here to hear what you have to say. Do you see what I'm getting at?

A Sure.

Q Relax as much as you can, Mr. Woods, and I want you to bear in mind that nothing you tell us would be wrong or right. All we want to do is know how you feel. You don't have to say anything to please any one of us. That's not your responsibility. Your only responsibility is to tell us how Mr. Woods **[3840]** honestly feels about anything. If you do that,

you will be doing your job. I want you to know that no one is going to argue with you or quarrel with you or try and talk you into something or sell you a bill of goods. If you have a question about anything, you ask it. If there is something that you need to tell us, you just tell us what it is. Like I said, we're trying to find twelve people to act as jurors. We only have seven. We have either talked to or considered ninety-eight people and we only have, out of those ninety-eight, seven that are qualified to serve on this type of a case. Do you see what I'm getting at?

A Yes.

Q Because it's a very special type of a case when it involves the taking of another human life. Now, let me tell you what our position is, Mr. Woods, that is what the State of Texas, that is Mr. Nelson, myself and Norman Kinne, who was not introduced to you yesterday, but he's actually the lawyer who will be leading on this case once it begins. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What I **[3841]** mean by that is, we intend to offer evidence before this jury once the trial begins to prove that Thomas Joe Miller-El is guilty of capital murder just as he is charged in this indictment. In other words, he did the capital murder. In the second phase of the trial, we intend to offer evidence to convince a jury beyond a reasonable doubt that the questions that determine life or death should be answered yes which will automatically result in the Defendant being sentenced to be executed down at Huntsville, Texas. That's our desire based on the evidence. I make no bones about it, Mr. Woods. We know that the law allows for the death penalty in this type of a case depending upon the evidence and we're going to do our dead-level best to provide this jury as the law requires with the type of evidence that will result in this jury making a decision that would result in this man being taken down—well, first of all sentenced to death and then at some later date being taken down to Huntsville, Texas where the penitentiary is, placed on death row and then at a time designated by law, taken

over to the death **[3842]** house where he will be put on—do you know what a gurney bed is or what a gurney is?

A Sure.

Q Put on a gurney, taken to the death house where he's strapped down. They put a needle in his arm and inject him with enough of a drug, a lethal substance, to put him to death and eventually in a grave somewhere, someplace. Now, I don't mean to be gory about it, but this is not something—this is something we've told all the jurors just to be fair with them, Mr. Woods.

MR. WEST: Your Honor, that is a misstatement. All the jurors have not been told that.

THE COURT: I'll sustain that. Let me say, Mr. Woods, that we talked to some—I believe you're juror number ninety-eight and obviously every juror hasn't been told the same thing for one reason or another.

MR. WEST: Your Honor, could the juror be excused for one second for purposes of the record?

[3843] THE COURT: Sure. Mr. Woods, let me ask you to go out in the hall.

(Whereupon, Mr. Woods, left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead.

MR. WEST: For purposes of the record, I think the record should reflect that it is my recollection that not all of the jurors have been told that, but all of the black jurors have, in fact, been told that either by Mr. Nelson or Mr. Macaluso.

THE COURT: I won't comment on that because I haven't kept track of it.

MR. MACALUSO: Judge, I would renew the objection made that, if either side had a legal objection to make, to make a legal objection. I don't see that there is any legal objection.

[3844] THE COURT: I don't think it is, either.

MR. WEST: I just wanted the record to reflect that.

THE COURT: I'll sustain the objection. Let's go ahead. As regards to that, I know some jurors, the record will reflect, have been told that. Who they were or what their situation was, I don't know.

MR. NELSON: All the jurors have been told that we're actively seeking the death penalty, Judge. It's been put different ways, but they've all been told that, that we're seeking the death penalty.

MR. WEST: Judge, the only thing that I'm saying is, as far as the description of the taking him down to Huntsville from death row to the death house and being tied down to a gurney and then a needle put in their arm and then injected with a lethal substance **[3845]** until they are dead and he added put him in a grave this time.

MR. CUNNINGHAM: The statement was made that we have told every juror that and that's not true. Mr. Nelson didn't tell the last one and Mr. Macaluso didn't tell the one before.

THE COURT: Let's move on. We could argue about this for an hour. I don't think it makes any difference. I mean, it does, but what a juror understands is one thing. Go ahead.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

Q Mr. Woods, the reason I tell you that is to put you on notice. We have put all the jurors on notice what our position is with regards to this case, all the jurors that we've talked to.

It is only out of fairness to you and the other jurors that you know exactly what the stakes are in a case of this type. I'm **[3846]** sure when you came down here or I'm reasonably sure that when you came down here, you thought like most people did, you would end up on a burglary case or a theft case maybe, a DWI, or something like that. I don't imagine many people came down to the courthouse on Monday, who are on this panel here, thinking that they would be involved in a capital murder case where they might be called upon to

make a decision that would result in them actually—you know, one of the people out there on that jury panel making a decision that would result in another person, Thomas Joe Miller-El, being put to death, being executed.

You know that they're executing people in Texas these days. It's not a situation where you're just reading about it, as you read about that from time to time or you hear about it on the radio or on TV. But if you were actually on a jury of this type, you could be called upon to make decisions that would result- in you actually participating in that decision. Like I say, it's not something where you just kind of talk about it with friends or your family. It's not a situation **[3847]** where you read about it or hear about it. I guess what it boils down to is, you at this particular point are right in the middle of it. Do you see what I'm getting at?

A Sure.

Q The reason why we tell you this is to make sure that it's clear as we can just what would be involved in this type of a case if you're selected as a juror. As I said earlier, you know as well as I do that this is the type of case, when you talk about the death penalty and you talk about capital punishment, you talk about executing somebody, people have strong feelings one way or the other. Do you see what I'm getting at?

A Yes.

Q Now, what we want to know and what is most important in the final analysis, Mr. Woods, is how you feel about it?

A About capital punishment?

Q Right.

A About capital punishment, I think that punishment is too easy. I think that's a quick relief. I mean, you know, to give a person quick relief—what I call capital **[3848]** punishment is you give somebody hard labor for the rest of their life. I feel like that's more of a punishment than putting them to sleep.

Q Well, you just think that's too easy?

A Yeah.

Q In other words, you feel, when someone is executed, it's over.

A It's too quick. They don't feel the pain. That's the way I feel about it.

Q What do you think a person ought to receive for committing the worse types of crimes? What sort of punishment do you think they ought to receive?

A Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

Q Do you. have anything against the death penalty itself?

A No. I don't have anything against the death penalty.

Q Do you know of any reason, Mr. **[3849]** Woods, why you couldn't serve on this jury and answer questions and follow the law if it meant you making a decision that would mean this man ultimately down here would die? Could you make that decision?

A Sure, I could make the decision.

Q Do you think you could do it?

A Sure.

Q Even if it meant, as a result of your decision, that man—can you see him where he is?

A Sure.

Q Breathing the same air we're breathing here in the courtroom, he would be taken down to Huntsville and put to death?

A Sure, I could make that decision.

Q Do you know of any reason whatsoever why you couldn't do that?

A No, I don't know no reason at all.

Q Why do you think people ought to be executed in the first place?

A I think if people go out and take people's lives for no reason at all, I think everybody should be punished.

Q If I told you I was against the **[3850]** death penalty or against real serious punishment and you were for it, and obviously you are, isn't that right, what would you say to me to try and convince me that I should give the death penalty to somebody and why it is proper?

A Because we don't need people like that on the streets.

Q Have you ever felt differently about that?

A No. I've felt that way all my life.

Q All right. Let me ask you this: You said that you felt they should be staked out over an ant hill—

A That's not what I call being funny, but—

Q I agree with you. That would be some kind of punishment. That's not the law you understand?

A Yes, I know.

Q Let's just say it was the law. Do you think you could actually sentence someone to be staked out over an ant bed?

A Sure. I feel like if they survive **[3851]** for a length of time, that would be enough punishment and I feel like they wouldn't do it again.

Q On the other hand, I gather you're the type of individual who could follow the law; is that correct?

A That's correct.

Q Obviously the law does not allow for that kind of punishment and, if it meant making a decision that someone would be injected with a drug, even though it may be quick and painless, you could go along with that if the facts were there?

A Sure.

Q What kind of offenses do you think a person ought to be eligible to receive the death penalty for? What kinds of crimes do you think ought to warrant the death penalty?

A For murdering people and trying to rob somebody and take something that is not theirs. Anybody that would go out and try to take something that is not theirs, I feel like they ought to be put away.

Q Have you ever felt differently?

A No.

[3852] Q How about your folks, are they alive, Mr. Woods?

A Sure.

Q Do you know how they feel about the death penalty?

A No. I never discussed it with them.

Q You're a married man. How about Mrs. Woods, do you know how she feels about it?

A She's been on jury duty before, but I have never discussed that with her before.

Q If you had to hazard a guess, what would you say?

A I feel like she would go for it.

Q All right. Let's talk a little bit about the law in this type of a case and a trial of a criminal case generally. A person can only receive the death penalty, Mr. Woods, in Texas for the offense of capital murder. It doesn't matter whether he rapes somebody. It doesn't matter whether you rob somebody, commit theft, or anything. You have to commit a murder first and it must be a very special type of murder. The death penalty is only available **[3853]** as a punishment under very rigid circumstances for capital murder only. Am I making myself clear?

A Sure.

Q Capital murder involves a murder and murder is a situation where one person knowingly or intentionally causes the death of another without any legal excuse or legal justification. Am I making myself clear?

A Sure.

Q Okay. By that I mean, when you think about murder, you don't think about self-defense. If I kill Mr. Nelson and you believe I did it in self-defense, that's not murder. That's a homicide, but it's not murder. You would have to find me not guilty.

A I understand.

Q Just like I would find you not guilty. The same thing if you kill accidentally. It's not murder. It's not guilty. Let's say you believe I was insane. When I killed Mr. Nelson, you believe I was insane. Not guilty. That's not murder. The same thing would be true if I came home and found out that someone that I love, like one of **[3854]** my children, had been sexually molested by my neighbor and he's up the street laughing about it, do you see, and I go into a rage and pick up a gun and run up the street and I kill him. Now, that's a homicide. It's bad, but it's not murder. That's a crime of passion and the law says that's voluntary manslaughter. It's not murder.

You must first commit murder. Even that type of murder, just regular murder, we'll call it, you can't receive the death penalty for that. If you commit murder and you murder a police officer or a fireman, a jail guard or you commit murder for money or you commit murder where you kill a bunch of people, then that becomes capital murder. It becomes more serious, you see, that type of murder. If you commit murder while you're committing a robbery, if you rob somebody and kill them, or raping them and you kill them, you commit burglary and kill somebody, arson or kidnapping, then murder under those circumstances becomes capital murder and you can receive the death penalty. Am I making myself clear?

[3855] A Sure.

Q How do you feel about that?

A I feel like calling a person insane, we're letting too many people get away with it, talking about insane. I feel like we ought to be able to given this to capital murder.

Q We'll talk about that in just a little bit. Let's forget about insanity for a little bit, all right?

A Okay.

Q How do those particular types of capital murder square with your way of thinking of what a person ought to receive—

A Fine.

Q Do you think a person ought to receive the death penalty for killing a police officer?

A Sure.

Q Do you think a person ought to receive the death penalty if he's robbing somebody, goes into somebody's business, for example, pulls out a gun and robs and kills them?

A Yes, even more so.

[3856] Q What would you give them for doing that? If you had your way about it, what would you do to somebody who went into a place of business, robbed somebody, and then executed them?

A I feel like they should get capital murder.

Q Would you have any problem returning the death penalty in a case like that?

A No.

Q You understand, before you could even consider the death penalty under the law, it would have to be for a type of capital murder?

A Yes.

Q Murder during a robbery—we've alleged in this case for Thomas Joe Miller-El, that man right down there, that he killed a man by the name of Douglas Walker while he, Thomas Miller-El, was robbing Douglas Walker. So we have the murder. We've accused him of murdering Douglas Walker while he was robbing Douglas Walker. I believe you said, if we proved that to you beyond a reasonable doubt, **[3857]** would you find him guilty?

A Sure.

Q If we don't prove it to you, you find him not guilty?

A Sure.

Q If we prove to you, in the second part of the trial—and you understand that the second part of the trial is where the issue of life or death is determined?

A Right.

Q You understand, in the first part is where you decide whether we've proved someone is guilty or not guilty?

A Yes.

Q You can do that? If we prove him guilty, you can find him guilty and, if we don't, you will find him not guilty?

A Right.

Q Now, in the second part of the trial, you're called upon to answer these questions. Did you get a chance to read those yesterday?

A I read these two here. I didn't see that.

Q It used to be under the old law **[3858]** just like in the movies. After a jury heard all the evidence in a murder case or a capital murder case, the jurors actually went back in the jury room and decided whether a person should receive the death penalty or a life sentence. If they all agreed he should get death, that's what the judge gave him. If all the jurors agreed he should get life, he got life. Do you think you could do that if you were called upon to do that?

A Sure.

Q Well, the law changed—that's kind of a trick question. The law changed about ten or twelve years ago and you don't do that directly. Instead, you answer questions. You don't decide whether somebody should live or die. You don't make that decision at all. You're not even asked to make that decision. All you do is, after you've heard all of the evidence, you decide whether or not we proved to you that these questions should be answered yes. If we do, you should answer them all yes. The effect or the result is, three yes answers is a sentence of death automatically. You don't have to write in

death. You just answer **[3859]** the questions yes and the Judge sentences the Defendant to be executed. Do you see what I'm getting at?

A Yes.

Q On the other hand, if you answer one or more of the questions no, do you know what happens then? The Judge automatically assesses a sentence of life for the Defendant. Do you see?

A Yes.

Q You don't decide life or death directly. You answer the questions and then the determination is made on the basis of the answers. Do you see what I'm getting at?

A Yes.

Q Could you do that?

A Sure.

Q Do you know of any reason why you couldn't do that?

A No.

Q You looked at the first two. The third question there—let's take them out of order. The third question, all that does ask you whether or not this was a provoked killing or was it an unprovoked killing. If **[3860]** you decide it was an unprovoked killing, you answer the question yes. Yes, it this was an unprovoked killing. Do you see what I'm getting at?

A Sure.

Q If on the other hand you decide there was some provocation that the victim did something to provoke the defendant into killing him, then you decide whether the defendant acted reasonably or unreasonably. Do you see how you could answer that question yes or no?

A Yes.

Q Okay. Now, let's turn to question number one. Does that cause you any problems at all?

A No.

Q Does that seem like a reasonable question to decide whether or not the defendant acted deliberately and with the reasonable expectation that someone was going to die, either the deceased or somebody else?

A That's a good question.

Q Do you see how you could answer that question yes or no?

A Yes.

[3861] Q Any problem with that?

A No problem.

Q Number two asks you, is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. What do you think you're being asked there?

A I think they want to know, if he got out again, would he act again.

Q All right. If he got out again, would he do it again?

A Yes.

Q All right. The key word may be that word probability. What do you think that word means? What do you think they're driving at with that question?

A Probably that he would do it again.

Q Would he probably do something like that again. You notice, Mr. Woods, that it didn't say would he probably do another capital murder or would he do another murder.

A A criminal act.

Q Of violence?

A Right.

[3862] Q What sorts of things come to your mind when you think of a criminal act of violence?

A Anything that you could do to harm somebody or kill someone or something like that.

Q Taking a baseball bat to Mr. Nelson, for example, and beating him up would be a criminal act of violence?

A Right.

Q Another murder, robbery, rape?

A Right.

Q What do you think would be valuable to you, what would aid you in answering that question yes? What would you want to know about someone before you would say, yeah, he would probably commit some criminal act of violence?

A It would depend on what we was talking about it, what I feel like that he might do and whatever kind of trouble that he was in, what we was trying him for.

Q What he did this time?

A Right.

Q Maybe what he did before, if he [3863] had done something before?

A That's what I would base that question on.

Q If you learned what role he had in the crime itself for which he's on trial, in other words you learn about if he was involved in the planning, did he plan it or did someone else plan it; during the offense, did he participate directly, was he calling the shots or was he standing by; did he have to kill this individual or did he not have to kill him. Do you see what I'm getting at?

A Right. That's the way I would answer that question.

Q Then after the crime, how did he react afterwards; was he sorry or was he just kind of blase about it? Do you see how you could learn enough about an individual to say, yeah, this is the guy that probably will do something like this again?

A Right.

Q In which case you answer the question yes?

A That's if we've already answered the question yes, he was involved and we're [3864] really wanting to know if he would do all these criminal acts again because ninety-nine

out of one, there's one that did at least two or three acts that way. They're going to constantly do it again.

Q You understand that these three questions are what separates life and death?

A Right.

Q If you answer one of the questions no, he gets a life sentence. If you answer all three of the questions yes, he gets a death sentence. I don't mean to keep harping on this, but do you know of any reason why, if you were on this jury and the proof convinced you that those questions should be answered yes, knowing that it's going to result in this roan over here being executed, do you know of any reason whatsoever why you wouldn't answer those questions yes?

A No, I don't know no reason at all.

Q Now, let's shift gears here for just a second, We've talked about life or death because that's the penalty for capital murder. A lesser offense of capital murder would be murder. Let's imagine just for a **[3865]** moment, as an example, that you're on a jury and let's say we charge the man—not this man, but some imaginary man—with capital murder. Let's say he committed murder during a rape. That's capital murder. We have to prove the murder and the rape. Got it?

A Right.

Q Let's say we prove the murder, but we don't prove the rape. You couldn't convict that person of capital murder under those circumstances because we didn't prove both of them, did we?

A No.

Q What did we prove?

A You proved murder.

Q If that were to happen, you would find him not guilty of capital murder and you would find him guilty of murder which is what we proved. Under a situation like that, Mr. Woods, the range of penalty is altogether different. It is no longer life or death. You just forget about that for

the moment. The range of penalty for murder is from five years to ninety-nine years or life. Can you see how broad that is?

[3866] A Yes.

Q The law allows you, if you sit on a murder jury, to find someone guilty of murder and consider the full range of penalty. Do you think you could do that?

A Yes.

Q I know you feel strongly about murder, don't you?

A Sure. I always feel that way. Anybody that go out and take somebody's life, I always feel that way.

Q By the same token, would you agree with me that there are all different types of murders and murderers and victims?

A Sure.

Q You know as well as I do, if we sat here for ten hours or ten days or ten minutes, we could think of a thousand or a million different situations where one person could end up killing another. Do you agree with that?

A Yes.

Q The law expects you, to be a qualified juror, to just say you will keep an open mind. Do you have an open mind?

[3867] A Sure.

Q Even though you consider all murders serious, you will agree with me, won't you, that some are more serious than others?

A Right.

Q Some killers deserve more time than others?

A Right. I agree.

Q Some may deserve less than others, right?

A Right.

Q All the law expects of you is to keep an open mind and wait until you've heard the evidence in a murder case. You haven't heard one stick of evidence so far, have you?

A No.

Q Just keep an open mind and tell us that you will follow the law and, if you hear a case that calls for the maximum and you think the right thing to do and the just thing to do, in other words, the proper thing to do is to give the maximum, you will give the maximum because you think he deserves it. Do you see what I'm getting at?

A Sure.

[3868] Q By the same token, you will keep an open mind and listen to all of the evidence in a murder case before you make up your mind and don't prejudge anything and just say, if you hear a case that calls for five years and you think that's the right thing to do even though it may be few and far between, if you hear a case that calls for the minimum and you know that's five years, you will give the minimum. Can you do that?

A Sure.

Q Any doubt in your mind about that?

A No.

Q Or anywhere in between, if you hear a case that calls for fifteen years, you will give that; twenty-five years, you will give that; fifty years. Can you do that?

A Sure.

Q Let me talk about one other thing. You understand that you don't have to imagine a situation where you would give five years or ninety-nine years or life?

A Right.

Q You've just got to say that you will keep an open mind. Will you do that?

[3869] A Right.

Q All right. The Judge will instruct you in regard to the law and the range of penalty for murder—this is kind of a strange situation, Mr. Woods. The law tells you about what we all know a little bit about and that's about the fact that people charged and convicted of murder and go to the penitentiary get paroled, don't they?

A Right.

Q There is such a thing as parole and such a thing as getting good-time towards parole and so forth. The Judge will give you some lengthy instructions when you go back to deliberate a murder case about these things. He tells you that a person—you get to know about these things, about parole and good-time. Then as soon as he gets through tell you that, he tells you that, because you cannot adequately predict how soon someone is going to get a parole or how that good-time is going to enter into it, you cannot consider either good-time or parole in deciding how much time a person ought to get for murder. Do you see what I'm getting at?

[3870] A Yes.

Q He tells you about it and then he says forget about it?

A Right.

Q That's not the Judge doing that. The Judge is just applying the law. You understand that?

A Yes.

Q In other words, you might listen to a murder case and say, well, under these facts I think he ought to get fifteen years or five years, but I think he's going to be paroled, so let's give him ten and then he will serve five years. That's a matter that comes up before the Board of Pardons and Paroles and the governor. It's really not your concern. Do you see what I'm getting at?

A Yes.

Q You just listen to the evidence that you have and you decide what the person ought to receive and not let the fact that a person could get good-time or parole. Can you do that?

A Yes.

Q Now, let me just ask you. Could **[3871]** you put aside your feelings—you said you had strong feelings about murder and murderers, that you think people who commit

bad murders ought to get something more than the death penalty; is that right?

A Yes, sir.

Q How do you square that with your thinking that you can give five years in a murder case or fifteen years?

A I don't think that's fair to just give a person something like that for going out to take people's life.

Q Do you think you could listen to a case and give five years if you thought it was proper?

A Give five years?

Q Yes.

A I don't feel like it's the right thing to give a person five years when I feel like he should get more.

Q Now, you understand that you haven't heard any evidence yet?

A I know. I wouldn't give him five years without hearing the evidence.

Q You're not going to give anyone **[3872]** ninety-nine years or life either, are you, until you hear the evidence?

A No. Right.

Q Are you telling me, Mr. Woods, what you're going to do is, even though all murders are bad, you will take into account all of the circumstances surrounding the murder and wait until you've heard all the facts to see how bad the murder is and what the relationship was between the guy that did the killing and the guy that got killed, what their backgrounds are, you know all of the realistic things that you can consider that would make one murder worse than another and, if you hear a case that calls for five years, you will give five years and, if you don't think it's worth five years, you will give ten years, fifteen years, twenty years and all the way up to ninety-nine years or life. Will you do that?

A Sure.

Q You understand that it may be a rare case where you're going to give five years and it maybe a rare case

where you would give ninety-nine years or life, would you agree with me?

[3873] A Sure.

Q It may take particular facts to give five years and real rare facts to give ninety-nine years or life, but if you hear them, you will give five years if you feel that's the right thing to do? Am I reading you right?

A Sure.

Q All right. I think I'm about out of time, but let me just ask you this: You understand that Mr. Miller-El here is presumed to be innocent. You understand that?

A Sure.

Q We've got to prove his guilt. You understand that the indictment is no evidence of guilt? That doesn't mean anything?

A Right.

Q You understand, if he doesn't want to testify, you can't hold that against him?

A Sure.

Q He may or may not testify. I don't know, but if he doesn't, you can't go back and say, well—you can't even discuss that fact. You can't say, well, that guy didn't take the stand, so he must be guilty. **[3874]** How do you feel about that?

A I can't prove nobody is guilty until they're proven guilty.

Q You understand that the State has got to do the proving?

A Right.

Q Can you go along with that?

A Sure.

Q You understand that you don't automatically believe the testimony of a police officer. Would you?

A No, I won't automatically believe anybody.

Q You would just judge the witnesses as they come; is that correct?

A Right.

Q Mr. Woods, I'm about out of questions here. I'm out of time, more important than that. Your favorite TV show is Rawhide; is that right?

A Right.

Q Is that still on?

A Yeah, it's still on.

Q On Channel 39?

A Yes.

[3875] Q I've seen the Lone Ranger on Sunday mornings. Let me just ask you: Do you have any questions at all of me, Mr. Woods?

A No.

Q Do you know of any reason why you can't be a fair and impartial juror to both sides?

A No, I don't know no reason at all.

Q It boils down to this, Mr. Woods: If we prove to you beyond a reasonable doubt that the Defendant is guilty just as he is charged in this indictment of capital murder, do you know of any reason why you wouldn't find the Defendant guilty of capital murder?

A No reason.

Q If we prove to you that these questions should be answered yes, do you know of any reason why you would not answer each question yes knowing that it would result in this Defendant being taken down to Huntsville and put to death?

A No reason at all.

Q I appreciate it, Mr. Woods.

MR. MACALUSO: I'll pass the witness.

[3876] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Woods, as you have been told, my name is Cunningham and along with Mr. West, to my left, we represent Mr. Miller-El in this case. I would like to ask you some questions concerning your questionnaire and possibly some questions concerning what Mr. Macaluso has asked you about. This may seem like a ridiculous question, but this is for the purposes of the record. What is your race?

A Negro.

Q Where is Harbor Road located?

A Oak Cliff, South Oak Cliff.

Q Are you buying there?

A Bought.

Q You own the house?

A Right.

Q How long have you owned your own home?

A My wife had it when she and I got married.

Q How long have you been living there with her?

A Twelve years.

[3877] Q You work for Stewarts Contract?

A Yes.

Q You're an assembler?

A Yes.

Q You've been with them thirteen years?

A Right.

Q How long have you been a Cowboys fan?

A Ever since they've been the Cowboys.

Q What do you think about a Redskin fan?

A I never was a Redskin fan.

Q How often do you go fishing?

A I go fishing every weekend.

Q Where do you go fishing?

A Lake Lavon.

Q Do you catch anything there?

A They're not biting.

Q How long have you been a member of Porter Temper Church?

A My wife is a member. I'm really a Baptist and my wife, since she and I got married, has become a CME.

[3878] Q In other words, she converted you?

A Well, no. As a kid I grew up in the CME. When I moved to Dallas in '56, I become a Baptist.

Q After you got married, you went back to what you were at the very beginning?

A Right.

Q Are there any members of your family or close friends who are in law enforcement?

A No.

Q You've never been in the military?

A No.

Q Do you know of any reason why you couldn't be a fair juror if chosen in this case?

A No.

MR. CUNNINGHAM: Pass the juror.

MR. MACALUSO: May we have a few minutes, Judge?

THE COURT: Surely. Mr. Woods, let me ask you to step out in the hail for just a few moments.

[3879] (Whereupon, Mr. Woods, left the courtroom, after which an off-the-record discussion was held, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, what says the State?

MR. MACALUSO: We'll accept the juror.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Macaluso, what says the State, please, sir?

MR. MACALUSO: The State would be pleased to accept Mr. Woods as a juror on this case.

THE COURT: Mr. West?

MR. WEST: Your Honor, the defense would be pleased to accept Mr. Woods on this jury.

THE COURT: Thank you. Mr. Woods, let me do a couple of

* * * *

[4537] SANDRA R. HEARN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Hearn. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne. We're all assistant district attorneys here in Dallas and we're the lawyers for the State.

To Jim's left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Hi, Ms. Hearn.

To Mr. Cunningham's left is Mr. Royce West.

MR. WEST: Ms. Hearn, good afternoon.

Q They're the defense attorneys who have been appointed by the Court to represent the man charged with capital murder, the Defendant. His name is Thomas Joe Miller-El. **[4538]** Can you see him from where you're sitting?

A Not very well, but I can.

Q He's the man who is charged with capital murder. I've taken the time to reintroduce everyone here to let you hear our names again and reacquaint you with the roles that we play in the case and then simply to ask you if you recognize or know any of us?

A No.

Q Or ever heard of any of us?

A No.

Q Ms. Hearn, you are of course at this point a prospective juror in this capital murder case and, as the Judge said, we have eleven jurors and you could be number twelve. We need to talk to you just simply to see how you feel about some things, what your opinions are about certain aspects of the law and then we'll all make a decision. We're looking for the twelve people who ultimately we feel will be the most fair and the most impartial and best suited to listen to this type of a case and make some pretty important decisions.

Let me begin by telling you what we told everyone else to this point. Number **[4539]** one, we want you to relax. There are no right or wrong answers to any of the questions we're going to be asking you. No one is going to quibble with you or quarrel with you or nit-pick, argue with you, change your mind or try and talk you into anything. You just tell us what is on your mind and the way you honestly feel, you see, and you will be doing your job. If we ask the right questions, we will be doing our job. If you have a question at all at any time, don't be bashful. You ask the question. If there is something that you need to tell us, the same thing. You just say what is on your mind, whether we come within a country mile of it or not. Your opinion ultimately, I hope you understand, is what we're really seeking at this time. I'll blab on here sometimes and it will seem endlessly, but that's not the important thing. We want to know how you feel.

Now that I've said that, let me tell you how we think about one thing, what our position is. This is very important, that you know right off from the very outset what our position is regarding this case based on the evidence and the law. We are actively seeking **[4540]** the death penalty in this case for that man at the end of the table. We know that the law allows for it under certain circumstances and we feel we will be able to provide a jury once it is selected with the type and qualify of evidence that would convince them beyond a reasonable doubt as the law requires that the Defendant Thomas Joe Miller-El is guilty of capital murder precisely as he

is charged in this indictment. That's done in the first part of the trial.

In the second part, once again we have the burden of proof and the law would require us to provide the jury with the type and the quality of evidence that would convince them beyond any reasonable doubt that the questions should be answered yes. You know the result of all yes answers in a capital murder case is a mandatory sentence of death. Am I making myself clear?

A Yes.

Q That's just our position. Everyone has a position, as the old saying goes. But we want you to know in this type of a case that we are actively seeking the death **[4541]** penalty. Ultimately it is the decision of the jury that really counts and really will prevail, so that's why we need to talk to you and see how you feel.

Now, you were asked this question here the other day about—you were given precious little preparation and time, you know three lines, how do you feel about the death penalty. Why don't you just tell us or share with us in your own words how you do feel about the death penalty and secondly, any reason that you know of why you couldn't actually sit on a jury of this type and render a decision if called upon to do so that would result in the execution of another individual?

A Okay. I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on first offense. I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty.

Q In other words, you do believe in the death penalty?

A Yes.

[4542] Q For certain types of cases?

A Yes.

Q I gather from what you're saying, if you were on this jury, you would take any case or any capital murder case strictly on a case by case basis and judge that case on

its face as presented. The reason I say that is, you said that you have certain things in your mind, for example, that you would want to hear is that correct, before you feel the death penalty would be justified?

A Yes.

Q In other words, you said for repeat offenders?

A Right. In other words, like if someone goes out and commits a murder and it's his first offense, I do not think he should have the death penalty imposed upon him, but if he goes to jail, serves time—if he gets out and he does it all over again and he's just a menace to society, yes.

Q In other words, you're talking about a continuing course of criminal conduct, serious type of criminal conduct?

A Right.

[4543] Q Would it have to be a series of murders or could it be something less—if you have a murder like a capital murder and something that precedes it, robbery?

A Yes. It would be according to the situation.

Q Again, you haven't heard any evidence and you cannot, of course, foreshadow testimony. You have to be guided by the facts, as I said earlier, and take it on a case by case basis. In other words, look at each individual case and each individual defendant and when you've heard all the facts render a decision?

A Right. You have to.

Q That's what the law expects of you and would actually require, that you base whatever verdict you reach in any criminal case, much less a capital murder case, on the facts once you've heard them. Can you do that?

A Yes.

Q All right. Now, you said you favored the death penalty is certain cases and for certain offense, I gather. What sort of offenses come to your mind that you think a **[4544]** person ought to receive the death penalty for?

A I think murder. I think severe torture of someone. I haven't thought this out. Extreme child abuse, especially.

Q Let me just tell you—you probably have some idea anyway. The law in Texas only allows for the death penalty in very special cases, in a very, very limited serious number of cases. It must be a murder to begin with and then it must be a very, very, special type of murder. The law has narrowed it down to where a person can only possibly receive the death penalty for a very, very few types of special murders. It's very, very selective.

In other words, even though you may feel it may be in order, as I might well, for certain other offenses—and I do—the law does not allow for it. I gather from what you've told us that regardless of your own feelings, you would be able to follow the law such as it is and it's only available for capital murder in Texas?

A Yes.

Q Here is a situation. Basically you have the offense of murder. That's what it **[4545]** is called in the penal code. It's not called first degree, second degree. It's just called murder. Murder is a situation where one person knowingly or intentionally causes the death of another without any legal excuse or any legal justification. We will talk about that in a little bit more detail later.

You can't receive the death penalty for murder. No matter how gruesome a murder may be, no matter how mitigating a murder may be, it doesn't really matter. The death penalty cannot under the law be imposed for what we call for these purposes regular murder. If you commit a murder of somebody, a particular class of individual like a police officer or a fireman in the line of duty, a jail guard, if you commit a mass murder or you commit a murder for hire, under those circumstances murder becomes elevated to the level of capital murder, a capital offense, for, which you can receive either a sentence of death or a sentence of life. Am I making myself clear?

A Yes.

Q One other type of capital murder **[4546]** is where you commit murder plus, murder while in the course of

committing another very serious felony, like murder during a rape, murder during a robbery, murder during a burglary, kidnapping or arson. The law says under those circumstances coupled with murder, you see murder plus or murder of that class of individual, mass murder, murder for hire and so forth and so on, those very limited special types of murders, you can receive either a sentence of death or a sentence of life. How does that square basically with your thinking? Do you agree with that?

A I agree.

Q In other words, certainly not every murder must be a capital murder and then not even every capital murder, you see, because it's either a sentence of life or a sentence of death depending upon the answers to the questions that are given to the jury in the second part of the trial. Am I making myself clear?

A Yes.

Q Now, let me just ask you a couple more questions about how you feel about the **[4547]** death penalty. You're a young woman, of course. Are your folks still alive?

A Yes.

Q Do you know how your mom and dad feel about the death penalty or would you hazard a guess?

A I don't know how my mother feels. My father believes in it, but I don't know how to elaborate beyond that.

Q Have you ever been opposed to the death penalty? Has there ever been a time in your life when you felt differently? Not necessarily opposed, but felt differently?

A No.

Q Now, let's talk a little bit about the procedure in any criminal case. These are things that are going to sound like a seventh grade civics lecture, but they're fundamental and we all know about these things. When we're talking about making life and death decisions in a capital murder case, then they kind of take on a new meaning, I think.

The first thing is—I don't think you're going to have any problem with any of these. The first thing is, the starting **[4548]** point of any criminal trial whether it be shoplifting or capital murder, is the presumption of innocence of the accused. I guess that's what separates our form of government to a large extent from the type we have in other countries. In other countries you're presumed guilty and you have to prove your innocence. Obviously it's not that way here. You must, of course, to be a qualified juror as the eleven other people we have on this jury already, presume Thomas Joe Miller-El to be innocent as he sits here. Can you do that?

A Yes.

Q In other words, it doesn't mean he is, in fact, innocent. It just means that's the starting point. The State must prove his guilt by evidence beyond a reasonable doubt or he's clothed with that presumption of innocence. It's just the same as you would be, your mom or dad, me or anyone else. Fair enough? Can you do that?

A Yes.

Q In other words, some people might say, you know, he's been arrested and obviously **[4549]** he's here in the courtroom and he's been indicted by a Grand Jury. You know, he must be a little bit guilty. You understand that's not how the law works at all. You're not a little bit guilty. You are either guilty because the State proves are guilty or you are just flat innocent. Can you abide by that?

A Yes.

4 In other words, you don't abide by that saying, where there is smoke, there's fire?

A No.

Q- You can presume the Defendant to be innocent as he sits there?

A What your saying is, the Defendant, as this trial goes on, is either going to have the death penalty imposed or he's going to be innocent?

Q We'll talk about that later. We're just talking about guilt or innocence.

A No, I don't have any problems with that.

4 Okay. Now, the same thing—you know the burden of proof is always on the State. We've brought forth this indictment and **[4550]** we have the burden of proof. We must convince you, if you're on this jury, and the eleven other people that the Defendant is guilty of capital murder beyond a reasonable doubt. If we do, you should find the Defendant guilty. If we don't, your oath would require you to find him not guilty. It's really pretty cut and dry. If we prove our case, we're entitled to a verdict of guilty. If we don't, he is definitely entitled to a verdict of not guilty. We don't quarrel with that. Any problem in that regard?

A No.

Q You understand that the indictment is no evidence of guilt. No matter how bad an indictment sounds—sometimes you see in the paper where it says, Billy Sol Estes indicted for this or so and so indicted for that. An indictment is not a finding of guilty whatsoever. Otherwise there would be no need to have a jury trial, would there?

A No.

Q Or a trial by a judge, for that matter. All an indictment is, is a legal document that sets out the accusation and tells **[4551]** him what he is charged with and tells us what we must prove to you if we expect you to find him guilty. No matter how horrible it sounds, whether it's capital murder, shoplifting, a DWI, it doesn't matter. The State must prove what is in the indictment or it is meaningless. Do you see what I'm getting at?

A Yes.

Q It is no evidence whatsoever. In other words, if we just read the indictment to you and the other jurors and we sat down and didn't offer any proof, you would have to find the defendant not guilty. It's as simple as that. Any problem with that at all?

A No.

Q As I said, the burden of proof is on the State and it is always on the State. In both phases of the trial in a capital murder case, the burden of proof is always on the State. We have to do all of the proving and they have to do none. We don't quarrel with that for a second. We know what the law requires of us and we're not quarreling or quibbling about that for a minute. We have pointed the legal finger at him, which the law **[4552]** allows us to do, and the law says fine. Therefore, we must do all, every last bit, of the proving. If we do, we're entitled to that verdict of guilty. If we don't, you find him not guilty. Any problem in that regard?

A No.

Q Furthermore, the counterpart of that is, while we have the sole burden of proof and we have to prove everything, they have nothing to prove and, as important, they have nothing to disprove. We've done the accusing and we must do the proving. The only obligation a defendant has in any criminal case is to be here during the trial. That's all. He doesn't have to call witnesses and doesn't have to testify. He doesn't have to say a word or have his lawyers call a witness. If the State doesn't prove its case, whether the defendant testifies or not, if the State doesn't prove its case and the defendant doesn't call any witnesses, it doesn't matter. You have to find the defendant not guilty. Do you understand that?

A Yes, sir.

Q You look to the State. You must **[4553]** look to the State as the accuser to do all the proving.

Now, the Fifth Amendment privilege applies to you, me or any one of our loved ones. It says basically that the person who is charged with a criminal offense cannot be compelled to testify in a trial if he doesn't want to. Furthermore, if the person chooses not to testify, which they have a constitutional and guaranteed right not to do, a juror or a jury cannot consider that as any evidence whatsoever of the defendant's guilt. Do you see what I'm getting at?

A Yes.

Q In other words, if the defendant testifies, fine. He has the right to that. If he wants to call witnesses, fine. You listen to them as you would any other witnesses. If he chooses not to testify, as he has a right to, because we have to do the proving. He has nothing to prove. If he chooses not to testify, you cannot hold that against him. Like the Judge would instruct you, you can't consider that in your deliberations. You can't hold it against hint as any evidence whatsoever. **[4554]** Can you abide by that?

A Yes.

Q Can you tell us that you would not consider the failure of a defendant to not testify or call witnesses against him at all?

A I'm sorry.

Q Are you saying—are you able to tell the defendant and tell all of us here that, if the defendant fails to testify and chooses not to, as he has a right not to, you will not hold that against him at all?

A Yes.

Q Not even talk about it and not even consider it?

A No.

Q Okay. Now, let's talk about criminal trials in general. They are divided into two parts. The first part concerns itself only with the guilt or the innocence that is in this charge, if the State proves the indictment or if we fail to prove it. If we fail to prove it, you find the defendant not guilty and everybody goes home. If you find the defendant guilty because the State has proven to you beyond a reasonable doubt the **[4555]** offense, then we go on into the second part of the trial. That's the part where you decide what the penalty ought to be. In a capital murder case, it is either death or life and that determination is made on the basis of the jury's answers to these three questions that the Judge gives the jury at the end of the evidence phase of the trial. Am I making myself clear?

A Yes, sir.

Q You know the result. All yes answers equals death. There is no question about that. Even though you don't write death in there, you write yes, yes, yes, it's tantamount to writing death because the law would then require the Judge by law, mandatorially, absolutely, to sentence Thomas Joe Miller-El to be executed. The same thing would hold true if we failed to prove to you that those questions all should be answered yes. In other words, if you answer one or more of them no, the law likewise requires the Judge to take a particular course of action and that would be a mandatory sentence of life. Whether he likes it or not, he can't override either of **[4556]** your verdicts. Am I making myself clear?

A Yes, sir.

Q Any problem with that procedure so far as you know?

A No.

Q The questions are over there on your left. I want you to bear in mind that the State has the burden of proving to you in the second part of the trial that those questions should be answered yes just as we have the burden in the first part of the trial to convince you of the defendant's guilt. Do you see what I'm getting at?

A Yes.

Q The burden of proof is always on the State and you must tell us, and your oath as a juror would require you to keep the burden where it belongs, at this table. Tell us you will make us prove and will require that we give you proof to convince you beyond a reasonable doubt that the defendant is guilty and tell us that you will require proof to convince you beyond a reasonable doubt that those three questions should be answered yes. Otherwise, you will answer them no. Otherwise, **[4557]** you will find the defendant not guilty. Can you do that?

A Yes.

Q I think you may have had a chance to look at two of those questions when you sat out there endlessly on Monday. Do you have any questions about those at all?

A No.

Q Number three, you may or may not have been able to see.

A No questions.

Q Okay. Bear in mind that you will only be called upon to answer those three questions assuming hypothetically that you are on a capital murder jury who has convicted somebody — we won't even talk about Mr. Miller-El from now on — of capital murder. You've heard all the evidence in the first part of the trial. You've heard whatever evidence may be presented to you in the second part of the trial and you may receive some and you may not. You've heard all of the evidence, in any case.

The judge would give you those questions and you and the other jurors would go **[4558]** back in the jury room and decide whether or not the State has shouldered its burden and convinced you beyond a reasonable doubt that they should be answered yes. If not, you answer them no.

The first one there, let's just take a peek at that. Any questions about that at all?

A No.

Q It's is pretty straight forward, isn't it? Do you see how you could answer that question yes or no depending on the type of evidence that you receive?

A Yes.

Q If you believe it should be answered yes beyond a reasonable doubt, you answer it that way. If not, you answer it no.

Let's go on to number two there. What do you think is being asked there, Ms. Hearn?

A I'm sorry. I have double vision right now and I have to yet my eyes in focus.

Q Just take whatever time you need.

A Bear with me.

Q Sure. I'm reading this question **[4559]** to mean that the defendant would commit crime that would be a menace to society. Am I correct?

Q That's for you to decide. You see the Judge won't give you definitions or any guidelines as to what those questions mean. It's for you and the other jurors to decide. You decide what they mean and that's what they mean. I think we could agree that's a question that looks towards future conduct?

A Yes.

Q And the key word may be that word probability. What does that word probability mean to you in the context of that question?

A A possibility.

Q Whether there is a possibility that the defendant would commit criminal acts of violence in the future. Fair enough?

A Yes.

Q What sort of offenses come to your mind when you think of criminal acts of violence?

A Oh, heavens—murder, rape, abuse to other human beings.

Q If we convince you beyond a **[4560]** reasonable doubt that he would probably commit some future acts of criminal violence, you would answer the question yes; is that correct?

A Yes.

Q You understand that a criminal offense—let's take a capital murder, for example—could be divided into three parts like anything, I guess, really; What happens immediately before, what happens during and what happens after. Would you agree with me?

A Yes.

Q In other words, when you learn about the planning, if any, involved in a capital murder, what role did the defen-

dant have in that planning, if any? Did he plan it or did someone else do it or was it a spur of the moment? During the offense did he take a key role or a passive role? Was he a leader or was he a follower? Was he calling the shots or standing alongside? Did he have to do the killing? Was it necessary or could he have done something else? Do you see? Then afterwards, was he sorrowful, contrite, remorseful for what had happened or was he nonchalant and blasé [sic] where he couldn't have **[4561]** cared less? Do you see what I'm getting at?

A Yes.

Q Allowing that you could hear all that sort of evidence in the first part of the trial when you learn all the dynamics and the full spectrum of behavior, do you think you could learn enough about an individual where you feel you could answer that question yes, this is the type of individual based on what I've learned about him so far that would probably commit some criminal acts of violence in the future?

A No, I can't say I could answer that.

Q Any particular reason?

A Well, the evidence would have to be awful strong. People change, so I can't really say I could answer that.

Q Let me just ask you—

A I could the past, but I couldn't the future part of it.

Q Let me just ask you this: What would be most valuable to you—what would you want to know about somebody to enable you to answer that question yes?

[4562] A I think it would be what they had done in the past, what the evidence—the hard evidence instead of a supposition.

Q If you had all the information I've described, the before, the during and after, and then you learn about the person's prior criminal behavior, if they had a prior criminal record, do you think that would enable you to answer that question yes?

A Yes.

Q The third question you may or may not receive. That basically and simply asks you whether or not it was a provoked killing or an unprovoked killing. Do you see how you could answer that question yes or no?

A Yes.

Q I just want to emphasize, of course, as I said before, that the burden of proof in both phases of the trial is solely and exclusively on the State. Just because you convict somebody of capital murder, that does not mean that he automatically receives the death penalty.

A Right.

Q He automatically receives a life **[4563]** sentence unless we convince you that those questions should be answered yes. Can you do that?

A Yes.

Q Let's shift gears here one second. Let's suppose for example that you're on a capital murder jury and you've found somebody—you've heard a capital murder case where the indictment alleges a murder during a burglary. That's one type of capital murder. We prove the murder, but we don't prove the burglary aspect of it. You understand that we would be required to prove both, the murder and the burglary. If that were to happen and you're on the jury, you would have to find that defendant not guilty of capital murder because we didn't prove capital murder, did we? What did we prove?

A Murder.

Q If that were to happen, you can forget all about what we talked about, life or death, because those are not penalties for the offense of murder. The law in Texas sets out the very, very, very broad range of punishment for a person convicted of murder, not capital **[4564]** murder, but what we will call regular murder. That range is as broad as it is for any offense in Texas. It's from five years to ninety-nine years or life. The reason for that is, I think you can understand, the law allows and takes into consideration that

there are an infinite number of circumstances where one person can commit the offense of murder. Would you agree with me?

A Yes.

Q You have to take it on a case by case basis. The law gives you that latitude as a reasonable open-minded person to say I'll follow the law and if the law is from five years to ninety-nine years or life, I'll consider that. I'll keep an open mind to that full range of penalty and I will wait until I hear all the evidence in a murder case. I don't care, I'm not going to prejudge anyone. I'll just wait and listen. If I hear a case that calls for the maximum and I think it is proper and the right thing to do based on all the circumstances and all of the evidence that I hear, I'll give it. If I hear a case to my way of thinking deserves, warrants and calls **[4565]** for the minimum, because I think that's the proper thing to do based on everything I learned, you know, once I hear the evidence, I'll give that whether it be five years on the bottom or ninety-nine years on the top or a life sentence. Would that be fair enough?

A Yes.

Q Can you do that?

A Yes.

Q In other words, you have an open mind and would continue to keep an open mind?

A Yes.

Q Now, we all know that murder is a situation where one person knowingly or intentionally causes the death of another. It's not self-defense. It's not an accident and we all know that. It's not an insanity situation. It's not a crime of passion where someone acts in a rage of sudden passion or a crime of passion like a father killing—

MR. CUNNINGHAM: Your Honor, we would object to counsel giving the juror specific factual examples.

THE COURT: I'll overrule **[4566]** the objection to that particular—as I understand it, you're giving an example of

what might constitute an offense and not in regards to any kind of punishment that this juror might assess?

MR. MACALUSO: That's true, Your Honor.

MR. CUNNINGHAM: Note our exception.

Q Do you see what I'm getting at?

A Yes.

Q All we're expecting you to do, which is what you said you can do, is number one follow the law because you respect the law. Am I reading you correctly?

A Yes, sir.

Q Do you have an open mind?

A Yes.

Q Will you continue to keep an open mind throughout a trial if you're on a murder case and wait until you've heard all of the evidence?

A I would try.

[4567] Q In other words, you haven't closed your mind to the minimum or the maximum for the offense of murder, the maximum penalty, have you?

A No.

Q It may be difficult for you to give ninety-nine years or life for murder, but would you do it?

A Yes.

Q You would have to hear special facts before you feel it would be actually warranted, ninety-nine years or life?

A They would have to be proved guilty.

Q And then it would have to be very special aggravated facts, wouldn't it?

A Right.

Q The same thing would hold true for the minimum, wouldn't it? Before you would give five years for murder, you would have to hear special facts, wouldn't you?

A Yes.

Q But if you felt it was proper to give five years for the offense of murder, would you give five years for murder after **[4568]** you've heard the evidence?

A Yes.

Q Let me talk about one or two other things here now. One is—and this is going to be kind of strange because the law and the Judge would actually tell you, if you serve on a murder case and found somebody guilty of murder, the Judge would instruct you as to the range of penalty. Then he would talk to you about what we all have heard about. That's parole. The Judge would instruct you and tell you that there is such a thing and there's such a thing at [sic] the Texas Department of Corrections calls good-time and a person who is sent to the penitentiary can acquire or accumulate good-time—they call it good behavior time—toward parole. Now the Judge would instruct you as to that and then he would go on and tell you that the decision as to any kind of parole matters is not his decision and it's not your decision. It's exclusively within the responsibility of the Texas Board of Pardons and Paroles and the governor. On the one hand the Judge is required by law to instruct you about parole and then the next thing he says, **[4569]** you can't control it because he can't control it and the lawyers can't control it, so you cannot consider that in assessing any particular number of years. Am I making myself clear?

A Yes, sir.

Q It's like here it is, now ignore it. The law would require you and the Judge would instruct you that you cannot consider parole in assessing a number of years you feel is proper in a murder case or any other case, for that matter. Can you do that?

A Yes.

Q Would you put that out of your mind, in other words, as the Judge would require you to do that?

A Yes.

Q In other words, if you hear a murder case that you think calls for five years and that's the proper thing to do,

you would give five years. You don't give ten years thinking, well, he will be paroled and I want him to get five years. Do you see what I'm getting at?

A Yes.

[4570] Q Can you do that?

A Yes.

Q One other matter here. I notice here that your dad is an FBI agent?

A Was.

Q And you have apparently a great deal of respect for the police officers that you work with; is that correct?

A Yes, sir.

Q Here is a situation that I think you can handle very easily. The law says that as a juror you decide the credibility of the witnesses who testify. You decide how much or how little of any witness you wish to believe. You can believe all, part or none of what a witness testifies to. The law is very specific about this. That is, that you should judge all witnesses by the same yardstick, so to speak. You don't automatically—a juror does not bless anybody with any more credibility or believability just because of their occupation, profession or their station in life. In other words, you start everybody out at the same point . Like Mr. Nelson says, it's kind of like a race. You start everyone off at the same **[4571]** line and as they testify, you decide whether or not some pull ahead of somebody else or someone falls behind, but you don't prejudge anybody. You don't start someone up here because, for example, they're a minister, or a doctor or a police officer, an FBI agent, or put someone behind because they're a skid row bum or they don't look good or whatever it may be. Do you see what I'm getting at?

A Yes.

Q Now obviously as they testify, a person may be more qualified in a particular area. You may feel a doctor obviously, once he begins to testify, is more qualified in the field of medicine or a police officer may be more qualified in

some areas about a police report. You wouldn't automatically believe or disbelieve anybody just because they're a police officer or a fireman, would you, or an FBI agent?

A Well, no because I believe, if anybody swears to God that they're going to tell the truth and take the stand, that they are.

Q And anybody can make a mistake, **[4572]** couldn't they? Anybody, whether it be a doctor or a police officer, could make a mistake?

A Sure.

Q I suppose anybody, including a doctor or a lawyer, a police officer, FBI agent, could even lie. I gather you could believe that, couldn't you? A police officer could lie about something.

A The ones that I know I don't think would lie purposely.

Q That's right.

A It would be a mistake.

Q Then you haven't met them all, have you?

A No.

Q That's what I'm getting at. You have to just say I won't automatically believe or disbelieve anybody. I'll wait and hear what they have to say. If I believe them, fine. If I don't, fine. Can you do that?

A Yes, sir.

Q Now, I've done a lot of talking and I'm about out of time. Let me just ask you this: Do you know of any reason whatsoever why you couldn't be completely fair and impartial **[4573]** to both sides in this case?

A No, sir.

Q Whether you work with police officers or your dad was an FBI agent or not, you're going to make the State prove its case beyond a reasonable doubt, aren't you?

A Yes.

Q If we prove it to you, you said you would find a defendant guilty; is that correct?

A Yes.

Q And just as sure as you're sitting there, if we don't prove it to you beyond a reasonable doubt, would you have any qualms at all about finding the defendant not guilty?

A No.

Q And you would find him not guilty; is that correct?

A Yes. I'm sorry. I hesitated there because I was—I'm taking all this in. This is a first experience for me.

Q In the second part of the trial, you will make us—the law requires this. You will make us prove that those three questions should be answered yes; is that correct?

[4574] A Yes.

Q And if we don't, will you-answer them no?

A Yes. Do you mean all or partially?

Q The burden of proof is on us at all times in both phases of the trial to convince you beyond a reasonable doubt first that the defendant is guilty and second, third and fourth that those questions should be answered yes. If we don't, you find him not guilty or you answer the questions no.

A Right.

A Fair enough?

A Fair.

Q You will keep an open mind as to the full range of penalty for murder?

A Yes.

Q You've been real polite and real kind to me and I appreciate. Thank you. Mr. Cunningham is going to have some questions for you now.

MR. MACALUSO: I'll pass the juror.

[4575]

EXAMINATION

BY MR. CUNNINGHAM:

Q Ms. Hearn, as you've been advised, my name is Cunningham and along with Mr. West to my right, we represent Mr. Miller-El who is charged with the offense of capital murder in this case. I'd like to talk with you concerning some of your responses to Mr. Macaluso and also ask you about some of the information contained on the questionnaire that you filled out on Monday.

Let me say at the outset that no one is going to argue with you. No one is going to quarrel with you. No one is going to try to convince Ms. Hearn that any answer that she gives with respect to any question is a wrong answer. For once in your lifetime, you cannot give a wrong answer. Any answer you tell us and the Court is a correct answer because that answer tells us lawyers and the Court how Ms. Hearn feels about various aspects of the law. It also helps us, helps the lawyers, in their effort to determine whether or not Ms. Hearn would be a fair and impartial juror if chosen in this case and that she does **[4576]** not have any bias or prejudice in her feelings either for or against the State or for or against the citizen accused in the case.

With that in mind and with that understanding, I hope that you will be as candid with me as you were with Judge McDowell on Monday and as you were with Mr. Macaluso a little while ago. Would you do that, also?

A Yes.

Q Where is Bent Tree Forest?

A Far North Dallas, north of Prestonwood Mall.

Q Is it near Bent Tree Country Club?

A Yes, I think. I'm not a member there.

Q Is that an integrated neighborhood?

A As far as I know, yes. I mean we have Hispanics and blacks living in the neighborhood.

Q Okay. And 2210 is an apartment complex?

A A condominium.

Q Are there any blacks living in the condominium where—well, is there more than **[4577]** one?

A Yes. From what I know, there are three families.

Q How many condominiums in the complex?

A I have—roughly a hundred.

Q Do you know the three black families that live there?

A I know one of them.

Q Where is he employed? Is he employed in University Park?

A No.

Q IBM, Xerox?

A Southwestern Bell.

Q What is their name?

A Their name is Herbert and Juanita Miller.

Q Do they have any children?

A Two, a little boy and a little girl.

Q You're employed by the City of University Park?

A Yes.

Q You're a purchasing agent?

A Yes.

[4578] Q Is that for the entire city of University Park:

A Yes, sir.

Q As a result of your employment as purchasing agent, you have daily contact with police officers in University Park?

A Yes, sir.

Q Do you have contact with any other police officers?

A No.

Q Does your father live here in Dallas?

A No, in Tennessee.

Q Well, I notice that he retired in 1965?

A I think, or '64, one.

Q Is he doing anything other than probably playing golf and tennis or is he doing any type of work?

A No. He had employment after he retired from the FBI, but then he has retired from that job, also.

Q The job that he took after he left the FBI, was that in some form of security?

A No, it was with a bank as a trust **[4579]** officer.

Q How long have you been with the City of University Park?

A Almost two years.

Q Were you employed any place else before the City of University Park?

A Yes, sir, Sun Belt Service Corporation, which is a bank, a holding company.

Q What did you do for Sun Belt?

A Director of purchasing.

Q In other words, the same type of job?

A Yes, sir.

Q And you went from Sun Belt to the City of University Park?

A Yes.

Q How long have you been a member of Prestonwood Baptist?

A Almost a year now—well, I'm not a member. I just attend their regularly, since last Easter.

Q Is that an integrated church?

A Yes.

Q Do the Millers go to Prestonwood **[4580]** Baptist?

A No.

Q You indicated that you believe in the death penalty; is that correct?

A Yes, sir.

Q That there has never been a time when you did not believe in the death penalty?

A No.

Q Would you attribute that to the fact that your father was engaged in law enforcement during the time that you were growing up, your childhood, junior and senior high schools and off to college?

A No, sir. That's my own belief from news media. Well, just hearing about the various court—well, various cases and the outcome of them.

Q As a result of hearing about the cases, you formed in your mind that there was—one, that you believe in the death penalty and two, that the death penalty serves some purpose in the community and in society?

A Yes.

Q The purpose that you feel the death penalty serves is what, if any?

[4581] A I think it's just putting away a person that really does not belong in our society at all. May I give an example here?

Q Yes, ma'am.

A There was a case not long ago in University Park to where a man posing as a lady scalded—well, you probably know about this—a four month old baby from its waist down. I saw these pictures and he was sentenced to life and my own opinion is that he should have had the death penalty.

Q Because of what he did to that child?

A Right—well, the child ended up dying. It couldn't possibly have lived. That's how I formed my decision.

Q I believe you indicated to Mr. Macaluso that where a person commits murder or a person severely tortures another person or extreme child abuse, that person who commits those offenses should receive the death penalty?

A Yes, sir.

Q You believe that strongly and you have believed that at least for a period of **[4582]** time?

A Yes, sir.

Q You understand that in Texas and under our present statute, a person who commits the offense of "regular"—and that's a bad word, but that's the only way, I guess, I can explain it—murder cannot receive the death penalty?

A Yes, sir, now I do.

Q Also, that a person—when you say severe torture, could you tell me what you have in mind?

A Well, that child.

Q The child where a person dressed up as a woman and then scalded the child to such an extent that the child died?

A Right. Well, it was just murder and I didn't think of that when I pointed that out as an example.

Q In an instance like that, you sincerely believe that person should receive the death penalty?

A Yes.

Q You also understand that under our statutes that presently exist, a person who **[4583]** commits that type of offense or a person who severely tortures another person which leads to that person's death is not punishable by the death penalty?

A Yes, sir.

Q Also, a person who is guilty of extreme child abuse, that in and of itself is not punishable by the death penalty under our statutes, but you believe the person who does that should receive the death penalty; is that correct?

A Yes, sir.

Q And you believe regardless of what the statute says that the range of punishment is for a person who commits murder or a person who severely tortures another or extreme child abuse, you still believe that person should receive the death penalty?

A Now—

Q Because of the facts involved with respect to those types of offenses?

A I can't really say that. I think when a murder is committed, whether it is purposely or—a sixteen year old boy or something, this is his first offense, no, I do **[4584]** not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation.

Q You've added another factor, the factor of age.

A Right. I pointed that other example out because it was a man doing that to a four month old baby who could not defend itself or anything. When there are adults involved, two adults involved that are responsible per se, especially for their own actions—I shouldn't have pointed that out. I'm getting all confused. In other words, I do not believe in the death penalty on first offense murder unless it is a child involved, defenseless child. I'm getting myself all mixed up. I'm embarrassed.

Q As I said earlier, you cannot give a wrong answer. It tells us how Ms. Hearns feels. If I understand what you're saying, a person who commits the offense of murder for the first time, it is your belief that person should not receive the death penalty; is that correct?

A Yes, sir.

[4585] Q Regardless of what the facts are, regardless of what the circumstances are?

A Yes.

Q However, in an instance where a young child is involved and you added defenseless, it is your feeling that the person who commits that offense against that child and that child dies, then the person should receive the death penalty?

A Yes, sir.

Q Even though the law says the person cannot receive the death penalty?

A Yes, sir. I still believe that, which makes no sense, I know.

Q Would you be able to put out of your mind and if you had that type of case that you have designed and you have indicated, just put your personal feelings aside and decide that case based upon the facts and circumstances and, if you believe that the proper punishment from the facts and circumstances called for ninety-nine years, could you give ninety-nine years?

A You're talking about the child?

Q Yes, ma'am.

[4586] A If the maximum I could give him was ninety-nine years?

Q Yes.

A Then I would push for the maximum. If I could give the death penalty, I would want to give the maximum to him.

Q As I indicated, in Texas the law says that is not capital murder. The range of punishment would be life and an optional fine of $10,000.00, ninety-nine years down to five. That would be the range of punishment for that type of offense. It is my understanding, if you heard those facts and those circumstances and you believed that the proper punishment called for life and a $10,000.00 fine and that was the highest you could give, that's what you would give?

A Yes, sir, it is.

Q Nothing less than that?

A No.

Q Under any circumstances?

A No. As long as he was proved guilty.

Q In other words, we cannot give you factual situations. In other words, I cannot **[4587]** give you a fact situation and say, Ms. Hearn, what would you do in this instance. All I can do is tell you what the range of punishment is and in this hypothetical we assume that, one, the person has been found guilty beyond a reasonable doubt and that the jury is there deliberating on what the proper punishment is for the factual situation that they have heard. This presumption is that the person has been found guilty beyond a reasonable doubt and the jury is trying to decide what the proper punishment is and it is my understanding, in that type of situation, the proper punishment you feel is life because that's the most you can give and/or a $10,000.00 fine?

A Yes.

Q Under no circumstances would you give anything less than that; is that true?

A Now, I guess I could would have to say no to that. It's so hard to answer some of these. You know you have to take it on a case by case basis, I would say, to really answer that right. You know, I'm sitting here trying to give you answers to get insight to me, but yet it's so hard because without having **[4588]** everything laid out—as you said, pointing out an example or something.

Q Earlier this morning another prospective juror said almost those identical words and probably—I don't know how many we've talked with, but probably I would say seventy-five to eighty percent of those that we actually talked with in some form or another said the same thing. The law says that we cannot give you examples. If I started to give you an example or a factual situation and said, Ms. Hearn, what would you do in this type of situation, the Judge would stop—first of all, he would be standing up hollering Judge, Judge, and then the Judge would sustain the objection because—so I can't give you a factual situation. The only thing I can tell you based upon what you have told me and in that instance, one, you know what the range of punishment is and, two, I understood you to say in that situation, since life is the most that you could give and/or an optional fine, that's what you would do; is that correct?

A I'm thinking of this example of this man, yes, you bet.

[4589] Q You would never give five years?

A Not to that particular case, but to another case, I might.

Q I believe you indicated that you come in contact with police officers every day?

A Yes, sir.

Q Have you indicated to anyone that you are a prospective juror for a jury where the capital punishment was involved?

A No, sir—yes, I have. My boy friend. I didn't discuss anything. I just -

Q That you as a prospective juror in a capital murder case?

A Not to any policemen, no, sir.

Q What does your boy friend do?

A He's laid off right now. He was an accountant for an oil company. Need I say more?

Q And the oil company went broke?

A Well, almost.

Q What is the autobiography of Jim Thompson?

A He was the man that went over and did all this silk in Thailand and opened up a shop. He was an importer of fine silk out of **[4590]** Thailand. He opened up a shop. It was very interesting. It was a gift.

Q You indicated that you read a book about a murder trial. Can I ask you what book and what murder trial?

A Well, Helter Skelter, I've read. I know I've read some and I watch Perry Mason every Sunday night. Oh, I can't think.

Q I hope the Judge won't apply this to my time, but I've got to tell you this.

THE COURT: I'll stop it for a minute.

Q Perry Mason is the worse thing that ever happened to the legal profession. I have been practicing probably—this is my twenty-sixth year and I would say Mr. Macaluso has been practicing for about fourteen and if you add ours together and if we add the Judge's, probably about twenty-six, there has yet to be one person that stands up in the

back, like the person in the last row, and says in the last five minutes and say, "I did it." Because if it ever happened, you will hear of Brice Cunningham having a major heart attack in the courthouse where it happens. That's TV and **[4591]** please cast that out of your mind.

First of all, let me give you a good example. All the witnesses in Perry Mason sit in the courtroom and hear everything that every other witness says. One of the first things the Judge is going to do in this case is swear the witnesses and then the rule will, in all probability, be invoked. The rule meaning that the witnesses cannot stay in the courtroom. Whatever you have seen on Perry Mason, please disregard it.

A I read a lot. I can't think of books I've read, but I know I have. I like mysteries. A lot of them may be fiction.

Q When you say you deal directly with the police department on a daily basis in University Park, could you kind of expand on that for me? What do you do?

A Yes, sir. It's mainly the chief lieutenant and captain that I deal with. They submit requisitions for purchases to me for various items that are needed and ninety-nine percent of the time questions are needed. They aren't putting down enough information or deliveries are messed up, you know, payment of **[4592]** the invoice that they have ordered from their authority, et cetera.

Q Then in answer to number forty-two you said, "Through work—cannot say enough good things about our policemen—and my father and his regard for Hoover." In other words, you have a high regard, I would assume, for the police officers at University Park?

A The highest.

Q Tops?

A Right.

Q You have the same regard for your father as the result of his work as a special agent for the Federal Bureau of Investigation?

A Yes.

Q And also you have a highest regards for J. Edgar Hoover?

A Well, my father does. From what daddy has told me that's, I'm sure, a prejudice of his, but I do.

Q In this case there would probably be a number of police officers and some people believe that—well, some people give more credibility to the testimony of a police officer simply because he is a police officer **[4593]** than any other witness. They said that's just the way I believe. That's based upon my belief, my training and in some instances it was because of their association with police officers. It may be because they have memories of their family who are police officers or people who are in law enforcement. They said because of my association with police officers, because of my association with person [sic] who are engaged in law enforcement and because of their training, their experience and all of that, they are not going to purposely get up and say something that is not true. Therefore, if I hear a police officer, I'm going to believe them quicker than I would, say, a lawyer or a defense counsel or the defendant or a ditch digger or something like that. First of all, there is nothing wrong with feeling that way. There's nothing wrong with believing that way and no one gets mad at those feelings.

However, the law says that because that person feels that way and believes that way and in effect gives an advantage to the testimony of a police officer, those person [sic] are not proper—would not be proper jurors in a **[4594]** criminal case. I made all that long speech to ask you whether or not because of the highest and top regard that you have for University police officers, the fact that your father was an FBI agent for the Federal Bureau of Investigation and your father's high regard for J. Edgar Hoover, which you relied upon, whether or not you would give more credibility to the testimony of a police officer simply because he is a police officer than any other lay witness?

A Well, I can't really say that because I know as nervous as I am, if I was a witness—if I was a witness and I

told a juror that, yes, I would put more credibility in the policeman because he has had a lot more practice going up on the jury stand and testifying and he's not that nervous, but anybody who would swear to tell the truth, you know swear to their God, you would have to say they're telling the truth. No, I can't really say—a policeman has just had more experience in testifying and being before a court. I think I would treat everybody equal in that.

Q You understand when a policeman testifies, he is testifying with respect to **[4595]** what he says is a factual situation?

A Right

Q And it's not whether or not he has testified more often than J. Jones who may have never been on the witness stand. It's what the person is actually saying and how the jury perceives that witness whether a police officer or a lay witness and whether or not the juror says, because this is a police officer, he is going to tell me the truth quicker and I should give more credibility to what he says than a lay witness?

A No.

Q You would not do that?

A No. I do know that a police officer—what I was trying to say before is, a police officer is going to seem more credible in my opinion and reliable because he has had more experience in doing this kind of stuff than somebody like me gets called to the witness stand. Nervous as all get-out.

Q Well, don't be nervous. Nobody is going to bother you.

A I know, but I can't help it.

Q We would get in trouble with the **[4596]** Judge and I don't want to get in trouble with the Judge any more.

You say seem credible. Would you explain—in other words, you said that a police officer would seen more credible?

A Well, he's going to be calm, composed, accurate, know exactly how to answer questions, you know, to answer yes or no or elaborate or whatever. Whereas the other person, this may be the first time he would be on the stand or something and he would be a little nervous or not come off as well as a police officer. That's what I meant. I do believe a police officer would tell the truth, but I believe other people will, too.

Q Say a police officer testifies and the citizen accused testifies. Would you give more credibility to the police officer —

A No.

Q —because he would seem more credible because of what you say is his experience and all that?

A No—you know, I can't really say that for sure. If there was a policeman up here in uniform and then some bum came in with **[4597]** a tee shirt and barefoot and something like that and just mumbled and didn't answer the questions correctly then yes, I would be prejudiced towards the policeman—and their stories conflicted, so it would depend.

Q And a step beyond that, the reason that you would believe the police officer or believe he was more credible is because of that uniform he had on and this fellow over here had on a tee shirt and no shoes?

A Yeah, right. Well, not as much as the way—well, I was pointing out the way he was dressed as just not respecting the court. But mumbling and not answering questions—you know what I'm trying to say?

Q Yes, ma'am.

A It's kind of human nature to feel that way.

Q The Judge is indicating that I'm not going to get my extra time so I've got to speed up. In a capital murder case, the jurors first of all have to find the accused—in a capital murder case, the jurors either answer one or four questions. The first question is whether or not the accused is guilty beyond a **[4598]** reasonable doubt. If they answer that no, then

that's the end of it. Everybody goes home. If they answer yes, he is guilty beyond a reasonable doubt, then they either get those two or those three questions. Without going into those three questions—and everyone will probably tell you, number two is the key question. In other words, because usually the jury can say with respect to number one, from what they get in the first part of the trial, that it was deliberate and that's yes, so let's move on to what the key question is, number two. Is there a probability that he is going to commit criminal acts of violence that would constitute a continuing threat to society. I believe you indicated to Mr. Macaluso that you would want to know whether or not the defendant would commit crimes that would be a menace to society; is that correct?

A Yes.

Q By that you mean whether or not he would commit murder, rape, assault to human beings?

A Well, I kind of think what I was meaning is, is the defendant a person that **[4599]** keeps repeating the—doing awful acts to society.

Q With respect to where you said if a person—I think you had said where a person commits murder for the first time, you would not give him the death penalty?

A No—well, no, I wouldn't.

Q Except in one isolated instance that you referred to?

A Right.

Q If you found a person guilty beyond a reasonable doubt of capital murder and you were back there answering the—trying to answer question number two and the evidence had shown you that person had no criminal record, you have no past history. All you have is what you heard in the first part of the trial. Could you answer question number two?

A Well, I would say no, but I would answer it.

THE COURT: You would answer it no?

A Wait.

THE COURT: I just want to know what your answer was.

[4600] A I would answer it no.

Q You would answer it no?

A Yes—the key word in that question number two is continuing and how can you say a first offender of a capital murder will be a continuing threat to society?

Q In other words, you're saying —and I don't want to put words in your mouth—that a person with no prior history cannot be a continuing threat to society?

A I don't think so.

Q In question number thirty-seven you were asked "Do you have any prejudice for, against, or fixed opinions concerning psychiatric or psychological testimony?" You answered yes. Is it for or against?

A I would say both for and against according to the situation. I think that sometimes people bring in a psychiatrist or a psychologist to tell the jury and—well, anyone in the courtroom that this person is mentally incompetent when in actuality they're not and then it works the other way, too. I don't put much store in that.

Q Are you saying you don't put too **[4601]** much store in the testimony of a psychiatrist or a psychologist?

A Yes.

Q Are you saying you would—would you give less credibility to the testimony of a psychiatrist simply because he is a psychiatrist testifying either one way or the other?

A Yes, sir, I would.

Q And you would you give less credibility to the testimony of a psychologist simply because he is a psychologist than any other person?

A Yes. Is the difference between them one gives drugs and one doesn't?

Q I haven't the slightest idea. Mr. West tells me that one is able to prescribe drugs and one is not. I'm not going to ask him which one. Whatever he is, if a psychiatrist got on the stand, you are not going to look at him in the same way you would someone else?

A I really don't think so.

Q With respect to fifty-three you indicated that you had served on a jury and was there anything in your prior jury experience **[4602]** that either upset or agitated to the extent that such jury service was an unsatisfactory experience? You said yes.

A This was absolutely ridiculous. I sat on a civil case from 8:00 until 4:30. The Judge made us go out and —it was a lawsuit—we came back in and he said, "'This is ridiculous. I don't know why I've kept you here all day. I'll dismiss this case. Neither side has evidence." We sat there all day on that. Yes, that was—

Q Because of that experience in that case would that affect you if chosen as a juror in this case?

A No.

Q A couple of other areas I need to talk with you about. One is the lesser and included offense of capital murder which is murder. The range of punishment is not less than five nor more than ninety-nine, life and/or a $10,.000.00 fine. We're not using the example that you used. This is where the accused had been found guilty beyond a reasonable doubt and you believe from the facts and circumstances of this murder case that the **[4603]** proper punishment for the knowingly and intentional taking of the person's life without any legal justification or any legal excuse, the proper punishment is five years, could you consider and vote for five years?

A Yes, sir.

Q When you came in on Monday and you saw us sitting here, did it—could you tell me what went through your mind?

A Well, I was confused and wanting to know all the facts. That's really what I was sitting there wondering.

Q Did you wonder which one was the Defendant?

A At first until the Judge told us.

Q Did you say to yourself what did he do before the Judge told you?

A Yes.

Q Some people believe where a person is—in other words, you walk in, you see him sitting there and the first thing you say is I wonder what he did. Did you presume that he is innocent as he sat there or did you believe that he must have done something because otherwise he wouldn't be sitting there?

[4604] A I didn't have any thoughts either way on that.

Q Can you presume that Mr. Miller-El is innocent as he sits there right now?

A Yes.

Q And would you-continue that presumption until the State proves, if it can, beyond a reasonable doubt that he is guilty of something, if they can?

A Well, as I said before, that's America.

Q That's a what?

A That's America. That's our way. You would have to think that way. I have a flag in my purse, if you want me to wave it.

Q John Wayne, Jesse Jackson, apple pie?

A Right.

Q Mother, father, FBI, Hoover, right, and not necessarily in that order?

A Right.

Q And the Republican Party?

A Right.

Q Young Republican?

A Yes.

[4605] THE COURT: And old Republican.

A You know, there is—I was asked earlier if there was anything that would influence me. There is something that would influence me as you pointed out a while ago. If I was the only person causing a hung jury—is that expression still used?

Q Yes.

A That would probably sway me.

Q The law anticipates that there are twelve people that comprise the jury. However, there are twelve individual jurors that the jurors will listen to the evidence, hear the Court's charge, the argument of counsel, and go back in the jury room and deliberate with the jurors about the proper punishment and at some point they will make up in their individual mind what the proper punishment is based upon the law and the evidence and that they render that regardless for which side, but they render that individually based upon the law and the evidence that they had heard in the case. If they sincerely believe that this was the proper verdict, that they would do that and that they **[4606]** would not change their minds simply because the other eleven believe one way.

You're saying if you were a juror and the other eleven over there said, no, it's this way, then you would give in?

A After deliberation, I probably would, yes. I don't think if everybody felt that way so strongly and I was the only person, then after deliberation in which cases are pointed out and things are reviewed then, yes, I probably could be swayed easily.

Q The jurors are not going to have any cases pointed out to them. The Judge -

A After reviews of what was presented in court is what I meant.

Q The State and the accused is entitled to have a juror that says, once I make up my mind, I'm going to render that decision and I'm not going to give in simply—based upon the law and the facts and the evidence that they heard.

They, having heard the facts, the evidence, considered it, deliberated, make up their mind what the proper decision is based upon those facts and once they do that, that they render that verdict. I get the **[4607]** impression —

MR. NELSON: Judge, excuse me. The law—I believe what Mr. Cunningham is saying is incorrect. The law contemplates that the jurors would deliberate, not make up their minds, fold their hands and sit in the corner and say that's it. They're always under a duty to deliberate, listen to what the other jurors have to say, discuss things.

MR. WEST: Your Honor, I'm going to object and ask that Counsel make a legal objection.

THE COURT: Reask the question. Without ruling on the objection, reask the question.

MS. HEARN: Your Honor, may I ask a question right quick?

THE COURT: I guess so.

MS. HEARN: Do all the juries—does it have to be a unanimous decision on a trial? Isn't that right?

[4608] THE COURT: I can answer that, I believe. In order for a verdict to be returned, there must be a unanimous verdict. Now—

MR. CUNNINGHAM: Except in an instance sometimes with respect to those two—

THE COURT: I'm going to qualify that. In a capital murder case, as regards to the answers to one and two and three if given, our statutes provide that at least ten people must vote no before it can be answered no. In other words, you can have two not vote. It doesn't have to be a unanimous no verdict, but all twelve jurors must vote some way. Does my answer to your question make sense?

MS. HEARN: Yes.

THE COURT: So when you ask does it have to be unanimous, in capital murder case—and this is the only exception to the rule—**[4609]** well, in civil cases—the only exception to the rule in criminal cases, every one of twelve jurors must participate in the verdict. At the guilt or innocence phase of the case, it must be unanimous, all twelve people have to vote the same way. If the defendant is found guilty of capital murder, then at the punishment phase it may be ten to two for a no. It must be all twelve for yes, but all twelve people one way or the other have to vote one way or the other. In other words, there can't be one juror that says I'm not going to vote yes or no. Does that answer your question?

MS HEARN: Yes.

Q With the Judge's explanation, was that your answer that you would give in?

A Very strongly possible if I were the only one. If there were eleven one way and I was the other way, after the deliberation.

Q I'm trying to see if that is a **[4610]** definite, yes, I would give in, if the other eleven said one thing and you believed something else after deliberating, you would give in?

A I would have to feel very strongly not to give in.

Q I think we need to know whether you would or you wouldn't.

A Then I would. If I have to make a choice, then I would.

Q You would give in?

A Yes.

MR. CUNNINGHAM: Your Honor, we will submit the juror.

THE COURT: On that last ground or anything else?

MR. CUNNINGHAM: About five of them, I believe.

THE COURT: Ms. Hearn, let me ask you to go out in the hall.

(Whereupon, Ms. Hearn left the courtroom, after which there was an off the record discussion, following which Ms. Hearn returned to the **[4611]** courtroom and the following proceedings were held.)

THE COURT: Ms. Hearn, that was a little longer than I anticipated, but I had to get into some matters.

Ms. Hearn, I'm going to spend a few minutes with you and go over some of the answers you gave to both lawyers really and make sure that I understand your feelings and answers as best I can. I want to take as much time as necessary, but it's late in the day and late in the week. We've been at this for five weeks, so the time we spend, I think is important.

There are a couple of observations that I want to make in that regard and I've done this with some other jurors in the same situation. They are these, as the lawyers have already told you: No one expects anyone to come down **[4612]** here to serve on jury duty and give up the way you feel about things, opinions about the law or how you feel about certain things. That's fine. The law expects citizens to be that way. We would be disappointed if people were not that way.

However, the other side of that situation is, if you get on a jury, if you're accepted on a jury, this jury or any other jury, the law requires that you take an oath that I give you as the Judge in this particular case at least and that oath says that you will a true verdict render according to the law and the evidence in the case. It merely says that you will follow the instructions I give you and the law that applies generally in the case and you will base whatever verdict you reach on the evidence in the case and not just a part of the law or not make **[4613]** up law on your own and not base a decision, if you do base one, on facts that aren't in the case. In other words, how you feel or prejudice or bias or something like that. It's a very simple oath and it's sometimes difficult to apply because, as I said, we all have feelings about the law that we may or may not agree with. I'm sure the lawyers, if they were given a chance to and I could too, could tell you areas of the law that we don't agree with. We think it's just not a good law. I would assume that these lawyers, like I do, follow the law even though they might not agree with it because that is the law. The place to change the

law if you don't like it is down in Austin and not up here in the courtroom or the jury room.

With that starting out point—in other words, you're **[4614]** entitled to feel the way you do, but if the way you feel would prevent you from following the law and the instructions in this case, then you're not a qualified juror. If you can put aside those feelings long enough to serve as a juror in this case and follow the law and the evidence, then you're qualified.

There were three areas that I made notes of that at least I had questions about. If you're to be sworn by me as a juror in this case, you've got to be able to take this oath that you will follow the law and you will base your verdict on the law. Let's talk about question number two first. I think that was the first area that I noted a question in my mind. Here is the law on the thing.

If the State of Texas proves beyond a reasonable doubt that a **[4615]** defendant is guilty of the offense of capital murder as they've alleged and you as a juror had found a defendant guilty of that, then at the punishment phase of the case, after all the evidence, if any, is presented to the jury, I'll instruct the jury then to go out and answer these questions, one, two and three, if the evidence raises three—but one and two are the critical questions as these lawyers pointed out. I will instruct the jury that in order for the jury to answer those questions yes, which would result in the death penalty being imposed, that jury, the twelve of them, must believe beyond a reasonable doubt that those answers ought to be yes. As I explained a moment or two ago, however if they fail to prove that beyond a reasonable doubt, of course, the answer ought to be no. **[4616]** I don't think you had a question about that.

In fact, I've heard it said and I'm willing to say this. I don't think it is an incorrect statement of law. I think you can assume, if you get that far, that is the punishment phase of a capital murder case, that the answers to one and two start out at no, if you will, in your mind, because if you answer it no or ten of you answer it no, the law requires that I

sentence the defendant to a life sentence. I haven't got any option at all. It's either death or life depending on how you answer those questions. I don't think it is unfair to either side to say that, if you want to put it that way, he starts out—you have to start out answering those no and then make the State bring you evidence somewhere in that case that **[4617]** convinces you beyond a reasonable doubt that they ought to be answered yes and, if they do that, then you answer them yes and the result follows.

Now, you said—and I heard it one way and maybe you said it another way and maybe the lawyers heard it still a third and fourth way. I understood you once to say that for a first offender, you couldn't assess the death penalty. I think you said words to that effect.

MS. HEARN: Right.

THE COURT: Let me put that belief of yours aside. That's fine and I'm not quarreling with you. However, in a capital murder case, if you have found a defendant guilty of capital murder, the law permits these things to occur. This is the evidence that the jury would be allowed to base its answers to one **[4618]** and two on. It may of course consider the evidence in the first phase of the case that it heard when it found the defendant guilty of capital murder to start with which is—you've heard it explained several ways - knowingly or intentionally causing the death of another individual in the course of committing another felony, so you found the defendant guilty of murder plus an attempted commission or a commission of another felony.

Now, in a capital murder case there is a punishment hearing following the guilt or innocence phase of the case just as there is in any criminal case in Texas. A burglary case has a punishment hearing. A DWI case has a punishment hearing. They all have punishment hearings. At that punishment hearing, both sides are entitled to bring **[4619]** additional evidence before the jury to help them answer these questions. Neither side has any responsibility to do so and particularly the defendant doesn't have to do anything at all, if he doesn't want to. He may or he may not, but he

doesn't have to bring anything and the State does not either. I can't tell you at this point in time whether or not you will hear any additional evidence.

If you did not hear any additional evidence or based on what you heard could you take the oath that if you had found a defendant guilty beyond a reasonable doubt and you went out and deliberated on one and two, if the evidence to number two showed you beyond a reasonable doubt that it ought to be answered yes from everything you had heard in the case, could you answer it yes?

MS. HEARN: Yes, if the **[4620]** State proved that he would be a continuing threat to society.

THE COURT: Now, you mentioned a word and I want to point this out and, if the lawyers want to object, they can. I think it is a correct statement of law. Number two deals with more than the future, what is going to happen in the future as opposed to what is happening today or what has happened in the past. As Mr. Cunningham pointed out, number one—I won't say it could be answered on the facts you heard in the first part of the case, but a lot of times the facts are pretty closely related about whether somebody did something deliberately and with the reasonable expectation that it would cause the death of another person. That first part of the case a lot of times has a lot of facts that bears on that, but **[4621]** that's not your problem.

Number two, I will tell you that there may or may not have been evidence at the first phase of the case that will help you answer number two and there may be additional evidence in the punishment phase. Are you saying that you could answer number two yes or no depending on what the evidence in the case had been and you won't automatically close out either answer; is that a fair statement?

MS. HEARN: Right.

THE COURT: Another question I had—or again it's more one that you raised than I raised. Both Mr. Cunningham and Mr. Macaluso spent some moments with you about how you would view the testimony of certain kinds of wit-

nesses. I think lawyers spent some time with you because of your background about how you would **[4622]** judge police testimony and I think you finally said that you wouldn't give them a head start, that is a police officer a head start, even over the defendant if he chose to testify. You would judge them initially at the credibility stage the same; is that—I understood you correctly in that regard?

MS. HEARN: Yes.

THE COURT: Now, you mentioned or you told Mr. Cunningham with regards to the testimony of a psychiatrist or a psychologist—and this was in reference to one of your answers on the questionnaire—that you did not have apparently a very good opinion of their kind of testimony; is that a fair statement?

MS. HEARN: Yes.

THE COURT: All right. I'm not sure I could even ask this **[4623]** question to get the answer from you that I think you want to give, but let me say this as regards to psychiatrist or psychologists just like the lawyers did about police officers. Every witness regardless of who he or she is starts out at the same point. That is, they start out, as Mr. Macaluso said, as it were in a race, even. Because of one reason or another, you used some good examples of a person—how they look on the witness stand as opposed to how another witness looks. That's legitimate. You can judge a witness—you know, you want to see if they're—you know, what their perspective was, their experience in the area about which they're testifying, how they stand up under cross-examination. All of these are factors that you as a juror could take into consideration. In that regard, **[4624]** applying that to a psychiatrist, are you saying that you could not believe the testimony of a psychiatrist?

MS. HEARN: No. But any evidence that a psychiatrist or a psychologist gave, I would like to be factual and not—I would just [sic] their testimony on the facts and not just what he supposes from his study of the mind and the sociology of human nature.

THE COURT: Well, let me submit this to you. Sometimes doctors, psychiatrists or psychologists include just like any kind of expert—offer opinions about things and they may or may not be qualified to do so, but assuming they did, the law provides that under certain circumstances certain people can offer a jury opinions about things and the jury doesn't have to believe them, but the law entitles **[4625]** the particular witness—for example, in an intersection collision case in a civil court, the parties are allowed to call witnesses who can testify based on the skid marks, how fast the car was going and such as that. Police officers, for example, often are qualified in that area because they've been trained. Now, that's an expert witness.

A juror in a criminal case can consider the testimony of anybody if they want to. Are you saying, if a doctor was called in this case to testify, a psychiatrist or a psychologist, and he testified about some opinion fact that you couldn't accept that and couldn't believe it or are you just saying you would be awful careful before you did believe it?

MS. HEARN: That's according to what it is. Why I mainly **[4626]** object to the psychiatrist is, so many things can be done by faking a test by a person, you know, the ink spot. People fake what they see in that. Or through drugs even, the mental stability of someone can be affected under someone else's control so much and that's what I was thinking of when I answered that question. Like the skid marks that you were pointing out, if the situation applied under a psychiatrist's area as an expert from what findings have found in the past, then yes I could take him as a credible witness.

THE COURT: Well, assuming in a hypothetical situation that a psychiatrist or a psychologist testified and gave an opinion. Are you saying that you could accept that if you believed that his opinion was a valid opinion?

MS. HEARN: Yes.

[4627] THE COURT: You're not saying you wouldn't believe it under any circumstances then?

MS. HEARN: I would believe that he is telling the truth to the best of his ability. However, there are just some things that can't be proven.

THE COURT: For example?

MS. HEARN: Well, like someone faking a test to prove that they are mentally incompetent.

THE COURT: Do you believe the doctor can't tell that a person is faking or not faking?

MS. HEARN: I've never thought of that.

THE COURT: I'm asking you what you mean. What do you mean?

MS. HEARN: I think sometimes—just like people can fake passing a lie detection test, I think sometimes no, we can't tell.

[4628] THE COURT: You think even a doctor couldn't properly evaluate a person, even a psychiatrist?

MS. HEARN: Right.

THE COURT: Well, again I'm asking this question. Would you still listen to the testimony of a psychiatrist or a psychologist and decide whether or not to believe that witness for whatever reason?

MS. HEARN: Yes.

THE COURT: And if you believe whatever he testified to, that it was believable and credible, could you base a verdict in a case on it if you believed it?

MS. HEARN: I don't know. If it came down to what the psychiatrist said, I would just have to hear what the evidence was.

THE COURT: In other words, if a psychiatrist — we're not talking about this case. We're **[4629]** talking about a case. The questionnaire is a very broad questionnaire. It covers about six different questions. If a psychiatrist was called as a witness in a case and you heard his testimony about an issue in the case and he was cross-examined and you believed after hearing whatever it was he said that his

testimony was believable and could be given some weight, could you do that?

MS. HEARN: Yes.

THE COURT: Likewise, for whatever reason as long as it was a reasonable standard that you applied—do you understand what I'm saying?

MS. HEARN: Right.

THE COURT: Okay. I'm going to assume that Ms. Hearn is sitting as a juror in this case, if you're sworn as a juror in this case—and this is going to go **[4630]** into the next area I want to talk to you about. All the lawyers assume that you're a reasonable person. You have a right to be critical of the testimony, to be hypercritical, if you want to be, of the testimony as long at some point in time you are reasonable about how you judge things.

I think you've said, and I don't want to put words in your mouth. I'm a lawyer just like these other lawyers. These are very good lawyers. No one has tried to trick you or get you to say something I don't think you want to say and I haven't tried to, I hope. What you're saying is, you would apply your adult common sense to judge the testimony of any witness and, if you believe that witness beyond a reasonable doubt, you will base a verdict on that witness testimony and, if you didn't, you just **[4631]** wouldn't do it; is that—

MS. HEARN: Exactly.

THE COURT: You wouldn't automatically then disregard the testimony of a psychiatrist or a psychologist just because of their profession?

MS. HEARN: No, but like you said—no, I would believe him, but then there is only so much you can put as factual evidence of the study of the mind. Do you know what I'm trying to say?

THE COURT: Well, at a point in time are you saying it becomes opinion or because you can't grasp a mind like you can a broken bone?

MS. HEARN: Right. I mean, I would listen, but there are just some things—I don't know how to explain it. Do you know where I'm coming from? I would be [sic] believe him, but yet there are just some things that a psychiatrist cannot enter into evidence as fact.

[4632] THE COURT: Obviously at a point what any doctor or any expert is going to say is going to be opinion, so what I'm saying is that's mostly what they testify to, is opinion. If they weren't doctors, police officers, meteorologists, FFA controllers, they're never at the scene of whatever it was that happened. They come in months later and say based on facts which are in evidence in my experience and training, I'm now able to give an opinion about something based on known facts. Opinion is not necessarily a fact. It is merely that. It's merely an opinion, but are you saying that you would take the facts that you based his opinion on and, if you believed his opinion was valid, you could accept it and, if you didn't, you wouldn't; is that what —

MS. HEARN: Exactly, yes. I **[4633]** wish I could have said it like that.

THE COURT: Now, finally and maybe most importantly—we're really serious about what we're doing. I think that's clear because you've been sitting in that box for about two hours now. Mr. Cunningham asked you about your feelings about participating as one of the twelve jurors and how you would perform as a juror. Let me start out by saying that we all appreciate the fact—none of us, first of all, have ever been on juries. I don't think any of these lawyers have. I know I have never been on a jury and I doubt that I will ever be on one. It's unlikely that these lawyers will ever be on one.

But be that as it may, we don't know what goes on in a jury room other than what jurors tell us later on, but we do know that **[4634]** the law requires when a jury goes out to deliberate in any case whether it be a capital murder case or a fight over a boundary line in a real estate situation, the law requires and I would instruct you, if you wrote me out a note saying, Judge, we can't agree, to go back into that jury room,

the twelve of you behind those locked doors and continue to discuss the evidence, continue to debate the evidence and argue about it if necessary and not surrender your own personal reasonable beliefs about it and to try to reach a verdict. That's the instruction I give a jury if and when they send a note out saying that they're not quite in agreement. The law then requires you, Ms. Hearn, if you're sworn as a juror in this case and you get on this case—and both sides are entitled to know that you will do **[4635]** this, not just the defendant. The State is entitled to know it also. If you're in there and you believe, for example, that the State has not proved its case beyond a reasonable doubt at the first phase of the case and you're the only juror that believes that way and the other eleven think that he is guilty as sin, but Ms. Hearn thinks they have just not satisfied in my mind beyond a reasonable doubt, here's what the law requires you to do.

The law requires you to ask yourself at that point, am I being reasonable in my belief? Am I conducting myself, as it were, in a reasonable manner? Am I looking at the evidence reasonably? Let the other eleven jurors argue for a while, if you want to, and try to convince you that you're wrong and they're right.

What the Defendant is **[4636]** entitled to know and what the State is entitled to know at that point in time, if you after all that still believe, no, by gosh, I just don't believe the State has proved its case beyond a reasonable doubt or I don't believe they proved one of the two ought to be yes, you will continue to vote the way that your heart and your mind tells you to vote and not let those other eleven people browbeat you or coerce you into a verdict that is against your understanding or belief of the evidence and the law.

Back to what we talked about ten minutes ago, you take an oath to follow the law and the evidence in the case and, if the law and the evidence in the case tells you at that point in time that the answer ought to be not guilty or no, then you will stick with it and yet still debate the case with **[4637]** your fellow jurors. Now, can you take an oath to do that or not?

MS. HEARN: Yes, I could. I would do that for a long, long time, but if it was a year from now and we're still deliberating—of course, I'm stretching it, and I was still the only one that thought the way I did, after talking and talking and talking and talking, then I would think it is eleven to one and so I would give in, but I would stick to my own opinion for a long time.

THE COURT: Are you saying you would give in just to get the case over with or are you saying you would give in because they convinced you that you were wrong?

MS. HEARN: They would convince me.

THE COURT: They would have to convince you to change your vote based on some reason and not just because, well, it's 12:00 **[4638]** o'clock and I want to go to lunch?

MS. HEARN: Right.

THE COURT: I can assure you that I'm not going to make a jury deliberate for a year, but I don't think that's the record. I'm not trying to be light about this because this really is an important question and in these kinds of cases, I'll be very honest—and I'm probably going beyond where the lawyers would like me to go, but this is a very serious case. It's a very important case. The State has told you, if they can get a guilty verdict in the first phase of the case, they're going to ask you to answer those questions in such a way that this man is going to be put to death.

This Defendant over there needs to sit there right now knowing that, if Ms. Hearn is the only one in there sitting there on **[4639]** his side because she believes that's the evidence, he's entitled to know that you're going to stick there until you're persuaded fairly otherwise or stick there until I discharge you. Can you tell me that you will do that?

MS. HEARN: Yes, I can do that, but I can also tell you I would do that for the State, too.

THE COURT: Sure. That goes both ways. I mean, if you're the only one for guilty and the other eleven are for not guilty, you will still [sic] there and hold out until they

persuade you to change your mind fairly. It cuts both ways. Everything in this case cuts both ways except that the State of Texas has the burden of proof and the Defendant doesn't. That doesn't change.

Ms. Hearn, let me ask you to go back out in the hall one more time. We've got to argue some **[4640]** law.

MR. CUNNINGHAM: May we approach the bench?

(Whereupon, an off-the-record discussion was held between counsel and the Court outside the hearing of the juror.)

THE COURT: You've been there for a long time and you've said a lot of things and I took notes and the lawyers took notes and I want to make sure that I heard everything the same way they did. I'm going to go back to one thing particularly. I think you said something different a few minutes later and that's why I didn't remember it.

You said somewhere along the way if a witness came in a tee shirt and barefooted and somebody else was nicely dressed or whatever that you would start them out differently. Then later on **[4641]** you said, as I recall, that you would not start anybody out differently. You would start them all out at the same point. What I simply want to ask you is—the law is, every witness getting on that witness stand starts out equal regardless of how they're dressed or how they look, what color they are, what profession they are, anything of that sort. It may be that after the first couple of questions that you're able to give one of them a big lead over the other one, but every witness has got to be started out right because it wouldn't be fair, I hope you would agree or tell me if you don't agree, to believe one witness because he was better dressed than the other witness because a poorly dressed person or a bum, for that matter, I would assume, could probably give accurate facts about something **[4642]** regardless of how he was dressed. Would you agree with me?

MS. HEARN: Yes. I was not meaning the dressing as much as I was the respect to the court like when he got up

here and after the testimony started, how he presented himself. I was talking about mumbling or evading the question or something like that.

THE COURT: Are you saying then, as a witness testifies or during the time a witness testifies, you as a juror would be looking at how the witness looked, how they answered questions, if you want to, how respectful they were to the lawyers in court or whether they were dropped [sic] their eyes or avoiding eye contact, in other words all of these things that you—you're probably judging me right now as I'm talking to you. I assume that you are on some basis—whether I'm **[4643]** telling the truth about stuff. You're entitled as a citizen juror particularly in judging the weight or the credibility of witness to apply any kind of reasonable standard you want to in judging their testimony. If you as a juror believe a witness who testifies in a mumbling manner or comes in here and doesn't show any respect for the jury, for the lawyers, for the Defendant or the Court, won't look up, doesn't answer the questions directly, all those things are things you can legitimately and honestly take into consideration in judging that witness' testimony after you've heard him testify. Is that what you're saying?

MS. HEARN: That's what I'm saying. When I was pointing out the dressing, I was meaning that incorporated with the testimony. It's a package.

[4644] THE COURT: I thought that's what you meant, but I wanted to be sure.

Now, one final area and I'm going to come back to this one more time because I want to make sure I understand. Questions number one and number two, I think it's not going out of school to say, if the defendant is found guilty are the crux of the whole case, particularly number two.

I think it's clear that if the defendant is found guilty of capital murder, the jury in the second phase of the case, the punishment phase of the case, may or may not hear more evidence. The law doesn't require each side to bring any evidence at the second phase of the case. The law provides, if all the evidence that a jury has heard is what they heard at the

first phase of the case, the jury can base a verdict **[4645]** on just that evidence without any additional evidence. You may hear some and you may not.

Now knowing what the law is, that neither side has to bring you any additional evidence in the second phase of the case, if you took an oath as a juror in this case and at the second phase of the case they didn't bring you any additional evidence, at the punishment phase, but you believed from the evidence beyond reasonable doubt that those answers ought to be answered yes to one and two, could you answer them yes?

MS. HEARN: Yes.

THE COURT: Likewise—and this is just as important and maybe more important—at the second phase of the case, if you hadn't heard any evidence from either side at the second phase of the case and you believed based on **[4646]** the evidence you had heard that one or two or both of those answers ought to be answered no, you can answer them no?

MS HEARN: Yes.

THE COURT: In other words, you wouldn't automatically answer them yes just because you didn't hear anything in the second phase or no just because you didn't hear anything in the second phase; is that fair?

MS. HEARN: Right.

THE COURT: The State has got the burden of proof. The burden never shifts. So you're saying that you would base whatever verdict you did get at either phase of the case on the evidence you heard and, if they didn't convince you beyond a reasonable doubt that those answers ought to be yes, yes, yes, you wouldn't answer yes, yes, yes; is that fair?

[4647] MS. HEARN: That's correct.

THE COURT: Let me ask you to step outside one more time and that will be it, believe it or not. The reason we're doing this is to take up law matters, Ms. Hearn. It isn't anything offensive against you.

(Whereupon, Ms. Hearn left the courtroom, after which the following proceedings were held.)

THE COURT: Mr. Cunningham, I'm going to hold that she is qualified. I hope I've covered all the bases, but I'm going to hold that she is qualified.

MR. CUNNINGHAM: Does the Court intend to—do I understand that the Court is now through qualifying the juror?

THE COURT: I'm through asking her questions regarding qualifications. Yes, I am. I hold that she is qualified, Mr. **[4648]** Cunningham.

MR. CUNNINGHAM: I will except to the Court's ruling. The juror told me when I was talking with her that, in the instance that she referred to where there was a young child burned and she realizing that the range of punishment was five years to ninety-nine or life, in that instance she would always give life and that she would never give five years. Based on that she is not qualified and we submit her for cause on that, too, and for the other reasons that we have previously submitted her. Back to the first one, she has not been qualified with respect to that.

Thirdly, she stated—well, she volunteered, if a police officer testified—no, I would give more credibility to the police officer than a person that walked in with a tee shirt and **[4649]** something and she stated her reason why. We would therefore submit that Ms. Hearn is not qualified and we submit her.

THE COURT: Mr. Cunningham, I'm going to respectfully decline to agree with you. I think that she qualified herself ultimately on the full range of punishment even though she unfortunately—I say unfortunately because that was an unfortunate case. We're all aware of it. I don't think it disqualifies her in this case because she qualified on the full range.

As regards to the police officer versus the bum off the streets, I think she qualified herself on her ability to give everybody's testimony the same credibility initially. She

cleared up a while ago, I believe, that she was only referring to that in reference to how she would **[4650]** maybe use that as some way to judge the weight to give a person's testimony. I respectfully decline to sustain those objections., I hold that she is still qualified.

MR. CUNNINGHAM: Note our exception. Your Honor, at this time we would renew on behalf of Thomas Joe Miller-El our motion for additional preemptory strikes for the reasons stated in the motion for preemptory strikes.

MR. NELSON: Our position is the same as it has been since the discussion of these. We feel like the Court's rulings have been clearly correct and have clearly been based on the law and on the prior case decision. There is no necessity to grant the defense an extra preemptory strike and they have no right to an extra preemptory strike.

MR. CUNNINGHAM: In **[4651]** response, I would resurge the reasons stated in the motion for preemptory strikes. Two, would offer in evidence all of the testimony from the prospective jurors six, twenty-one, twenty-four, seventy-nine, eighty-two, one hundred three, either by Mr. West or by myself in support of the motion of preemptory strikes.

THE COURT: Mr. Cunningham, I realize that it's a very important case to you and your client. However, I'm certainly going to stand corrected if the Court of Criminal Appeals should disagree with me on my judgment, but I believe the way we've conducted voir dire in this case throughout has been to, I hope, be very lenient in allowing the parties to even agree to excuse some jurors if one side or the other felt it was acceptable provided it was done with the **[4652]** agreement of the Defendant with the hope that we would talk only to those people that could be qualified one way or the other. I do not believe that I have forced the Defendant to use a strike on anyone who is not qualified. I'm going to respectfully decline again to grant your motion for extra strikes.

MR. CUNNINGHAM: Note our exception, Your Honor, and, in anticipation of what the State is going to do, would

advise the Court that as of prospective juror number one hundred seven, Max Wayne O'Dell, the Defendant Thomas Joe Miller-El no longer has any preemptory strikes and that he has exhausted all of his preemptory strikes and that jurors numbers six, twenty-one, twenty-four, seventy-nine, eighty-two, eighty-five and one hundred three are objectionable to him as the **[4653]** Defendant and that they have been struck and except for having to use preemptory challenges on prospective jurors six, Darol L. Weigant, prospective juror twenty-one, Sandra L. Jenkins, prospective juror twenty-four, Gwendolyn M. Smile, prospective juror number seventy-nine, Louis G. Wolters, prospective juror number eighty-two, Cheryl Ann Davis, prospective juror number eighty-five, Gary D. Spence and prospective juror number one hundred three, Russell L. Jones, they should have been removed for cause.

THE COURT: Again, I'll note that, but let the Court typically have the last word, Mr. Cunningham. Go ahead. I'm sorry.

MR. CUNNINGHAM: And also the Defendant Thomas Joe Miller-El would also object to the seating of Sandra R. Hearn as a **[4654]** prospective juror in this case and being prospective juror number twelve in this case and that she is objectionable to him for the reasons previously stated when they urged her for dismissal for cause and all of the reasons previously stated to the Court.

THE COURT: One final matter. I'm going to, of course, note your objections and, secondly, let the record reflect that regarding that last juror, I didn't cut you off even though I signaled you. You were allowed forty minutes to question her, which the State had something like thirty-two, which is not a lot more time, but because it was at a point in time where you were out of strikes, I wanted you to feel as free to talk extra as you could. I'm not going to give you any more time. I think Ms. Hearn—

[4655] MR. CUNNINGHAM: I was getting ready to ask you.

THE COURT: Well, I'll decline to do that, too.

MR. CUNNINGHAM: So that the record will reflect that the Defendant Thomas Joe Miller-El respectfully urges the Court to allow him additional time as the result of the Judge having talked with Ms. Sandra Hearn in excess of about twenty-seven minutes.

THE COURT: I'm going to decline to do that.

MR. CUNNINGHAM: Note our exception, Your Honor.

THE COURT: Let's bring her in and see what the State has decided to do.

(Whereupon, Ms. Hearn returned to the courtroom and the following proceedings were held.)

THE COURT: Ms. Hearn, back here one more time and I promise **[4656]** you this is the last time you will have to sit there.

MS. HEARN: That's all right. I'm really enjoying this.

THE COURT: We all are a little bit punchy and tired. I want to say this before I do anything else. These are very good lawyers and very professional and believe it or not, we've maintained a very good friendship. We're all friendly and we all like each other, I think. I'll pass that on to you for whatever it's worth.

Mr. Macaluso, what says the State?

MR. MACALUSO: May it please the Court: Ms. Hearn, we would be pleased to accept you as a juror on this case.

MR. CUNNINGHAM: I will renew all of the previous objections, the previous motion, and we reurge them again. We **[4657]** reurge all of those.

THE COURT: I have all of those in mind, Mr. Cunningham.

THE COURT: And consider them as if they were stated right now.

THE COURT: I have all of those in mind in detail, in great detail, and my ruling will be the same.

Ms. Hearn, you have been accepted or will be accepted as a juror in this case and I'm going to give you the oath that we talked about momentarily.

Before that, let me say this to you: We're all worn out and you may be, too, but it's very important that I tell you a few things. First of all, you've been qualified under the law to serve as a juror in this case, which means that both sides, both of these sets of lawyers and that Defendant particularly and me, **[4658]** because I've got to insure that this all happens, believe if you're sworn as a juror in this case, which I'm getting ready to do, you will follow that law that we spent all this time talking about. They have a right to rely on your answers as you gave them to me and you gave to these lawyers, that you won't change your mind in the jury room, if you said you would do something today, you will do it a week or two weeks from now if necessary. We believe that or you wouldn't be accepted as a juror in this case.

The other thing is, you can see the great deal of time it took to talk to you. You are the twelfth juror. We now have a jury in this case. I'm going to give you some instructions regarding that momentarily. I want to impress again on you the importance you have to this case **[4659]** and are important to this case. Now, after you're sworn I'm going to give you the instructions that I gave on Monday in a very general way, but most importantly I'm really going to give them to you strongly now because you're a very outgoing person and you're a very interesting person and I know that the temptation is going to be great when you go back to work tomorrow in University Park—because we're probably not going to start this case, as far as you're concerned before about Wednesday of next week. It's going to be very hard out there tomorrow when you're signing a purchase order or something for the chief or one of those detectives out there if somebody says something about this case.

I want to instruct you most specifically not to discuss this case with anyone including—I **[4660]** don't care who it is—your boy friend, or whoever and not let anybody give you any kind of input about this case or what you ought to do in the case because, again, Ms. Hearn, these lawyers, the Defendant and I am entitled to know that you're going to base whatever verdict you finally participate in this case on the

evidence you get from the witness stand there and exhibits, whatever that might be, the law that I give you and nothing else. It would be really unfair to the State or to the Defendant and to your fellow jurors if you let somebody tell you what you ought to do and went for it. I don't think you will. I just wanted to impress that on you because the situation in which you work is a little different than a lot of other jurors. You're around people all day who are in police work, firefighters. **[4661]** The City Hall is sort of small, everything considered, and a lot of you-all tend to see each other all the time. So will you promise me that you will honor that instruction?

MS. HEARN: Yes, sir.

THE COURT: Let me ask you to raise your hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: Before you get away, I may be able to tell you when to come back. Let me see the lawyers, please.

(Whereupon, an off-the-record discussion was held between counsel and the Court outside the hearing of the juror.)

(Whereupon, the voir dire proceedings in this cause were concluded.)

* * * *

(10)

No. 03-9659

Supreme Court, U.S.
FILED
SEP 2 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX VOLUME II OF II

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PETITION FOR CERTIORARI FILED APRIL 1, 2004
CERTIORARI GRANTED JUNE 28, 2004

JOINT APPENDIX TABLE OF CONTENTS

DESCRIPTION — Page

VOLUME I

1. *Miller-El* v. *Dretke*, 361 F.3d 849 (5th Cir. 2004) 1
2. *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) 21
3. General Docket-U.S. Court of Appeals for the Fifth Circuit, No. 00-10784 65
5. Civil Docket-U.S. District Court for the Northern District of Texas, No. H:96-CV-1992 74
6. Docket-Court of Criminal Appeals, Texas, No. 69,677 96
7. *Jury Selection in a Criminal Case*, Memorandum, Jon Sparling 99
8. Transcript excerpts re: jury shuffle: 6-9; 15-17; 658; 773-776; 842; 1529-1538; 1777-1795 113
9. Index to voir dire testimony 133
10. Voir dire testimony of Roderick Bozeman: 273-325 142
11. Voir dire testimony of Billy Jean Fields: 397-458 169
12. Voir dire testimony of Joe Warren: 1519-1560 200
13. Voir dire testimony of Noad Vickery: 1564-1636 220
14. Voir dire testimony of Edwin Rand: 1796-1856 260
15. Voir dire testimony of Carrol Boggess: 2000-2046 290
16. Voir dire testimony of Wayman Kennedy: 2170-2241 314
17. Voir dire testimony of Marie Mazza: 2304-2342 350
18. Voir dire testimony of Kevin Duke: 3260-3321 370
19. Voir dire testimony of Troy Woods: 3837-3879 403

JOINT APPENDIX TABLE OF CONTENTS—Continued

Page

20. Voir dire testimony of Sandra Hearn: 4537-4661 427

VOLUME II

21. Other excerpts from voir dire testimony: 55; 59-61; 86; 90-91; 94-95; 104; 107-110; 130-134; 152; 155-156; 176-178; 196; 203-204; 228-231; 332; 354-358; 392; 478; 482-485; 492; 506-512; 523; 527; 529-531; 548-551; 598; 603-605; 668; 670-671; 723; 728-729; 754-759; 829; 837; 922; 1005; 1012; 1016-1019; 1024; 1031; 1045-1052; 1063; 1070; 1072-1074; 1094-1098; 1127; 1130; 1134-1037; 1164-1168; 1207-1211; 1221; 1224-1229; 1252; 1255; 1258-1260; 1282-1286; 1369; 1372-1373; 1390-1394; 1437; 1441-1445; 1480; 1483-1485; 1640; 1645-1648; 1787-1788; 1866; 1870-1873; 1945; 1948; 1998; 2050; 2053-2054; 2103; 2107-2109; 2132-2139; 2158; 2242; 2246-2248; 2251; 2270-2273; 2345-2377; 2379-2380; 2399; 2401-2402; 2408; 2412-2414; 2435-2439; 2471-2474; 2518; 2520-2522; 2580; 2584-2589; 2651; 2654-2656; 2675-2677; 2738-2741; 2743; 2746-2748; 2770-2774; 2824-2825; 2828-2829; 2846-2851; 2913; 2916-2918; 2939-2945; 2985; 2988-2991; 3007-3013; 3017; 3020; 3023-3025; 3046-3051; 3090-3093; 3157; 3161-3163; 3185-3191; 3246; 3322; 3325-3327; 3351-3355; 3417; 3433-3465; 3469-3470; 3503; 3508-3511; 3525-3535; 3666; 3669-3670; 3677; 3679-3680; 3702-3709; 3744; 3747-3748; 3781-3782; 3784; 3786-3787; 3801-3808; 3884; 3886-3887; 3904-3909; 3942; 3946-3949; 4022; 4028; 4039-4040; 4056-4062; 4102; 4107-4110; 4168; 4171; 4173-4174; 4187-4196; 4240-4277; 4296; 4301; 4304-4308; 4314; 4328-4331; 4373; 4377-4392; 4452; 4454-4455; 4471-4479; 4487; 4526 487

JOINT APPENDIX TABLE OF CONTENTS—Continued

Page

22. Transcript of pre-trial (*Swain*) hearing (Dallas County, No. 5, Mar. 12, 1986) 790
23. *Miller-El* v. *State*, 748 S.W.2d 459 (Tex. Crim. App. Mar. 3, 1988) 885
24. Transcript of remand (*Batson*) hearing (Dallas County, No. 5, May 10, 1988) 890
25. Findings of Fact and Conclusions of Law Upon Remand From The Court of Criminal Appeals, *Miller-El* v. *State*, No. 8668-NL (Dallas County, No. 5, Jan. 13, 1989) 924
26. *Miller-El* v. *State*, No. 69,677 (Tex. Crim. App. Sept. 16, 1992) 930
27. Findings and Recommendations of the United States Magistrate Judge, *Miller-El* v. *Johnson*, No. 3-96-CV-1992-H (N.D. Tex. Jan. 31, 2000) 946
28. Memorandum Opinion and Order, *Miller-El* v. *Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000) 987
29. *Miller-El* v. *Johnson*, 261 F.3d 445 (5th Cir. 2001) 993
30. Excerpts from Miller-El's brief on direct appeal to the Texas Court of Criminal Appeals, filed Apr. 27, 1987 1008
31. Excerpts from Miller-El's motion for rehearing before the Texas Court of Criminal Appeals, filed Nov. 30, 1992 1013
32. Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, Dallas Morning News, Mar. 9, 1986, at A1 (Westlaw reprint) 1018

JOINT APPENDIX TABLE OF CONTENTS—Continued

Page

33. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, Dallas Morning News, Dec. 21, 1986, at A1 (Westlaw reprint) 1036

34. U.S. Supreme Court order granting petition for writ of certiorari (June 28, 2004) 1052

[55] CYNTHIA KAY YOUNG,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Young. My name is Paul Macaluso and to my immediate left is Jim Nelson. You may recall yesterday there was another gentleman who was seated right where I'm pointing now and his name is Norman Kinne. Norman, Jim and I are assistant criminal district attorneys here in Dallas and we represent the State of Texas in this particular case. We're the lawyers for the State.

To Jim's immediate left is Mr. Brice Cunningham and to Mr. Cunningham's immediate left is Royce West. They're the lawyers who have been appointed to represent the accused Defendant in this case and his name is Thomas Joe Miller-El. He's seated to their immediate left in the light blue suit over there. Can you see him from where you're sitting?

* * * *

[59] with your personal feelings about anything. You understand the very serious nature of what we're about here today and I think you understand why we absolutely need to know some things about your background and how you feel generally?

A Yes, sir.

Q Now, let me start off by telling you exactly what the State's position is in this case. The Judge foreshadowed some of this yesterday. We are actively seeking the death penalty in this case for Mr. Miller-El. I just want to put you on notice of that right at the very beginning so you will know exactly where the State stands with regard to this case and this Defendant because we intend to be able to provide a jury, once it's selected—and, of course, that would mean you, if you're on the jury, and eleven others—with both the type and the quality of evidence that would convince them in the

first part of the trial beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment and nothing less.

In the second phase of the trial, **[60]** once again, to be able to provide that jury with the type and quality of evidence that would convince them beyond any reasonable doubt whatsoever that all those questions, whether they be two or three, as it turns out, should be answered yes. You know the result is that the Defendant would automatically be sentenced to death under the laws of this state. That's our position. Of course, they have their position and they're entitled to that. Ultimately it's up to the jury to decide, but we want you to know going in what our position would be based on the evidence that we intend to present. Okay?

A Yes.

Q Now, just to get those preliminary matters out of the way, let me just ask you -and it really boils down, I guess to a large degree in any case, to some of the questions you've already answered here on the second and third from the last page of the questionnaire. Let me ask you: Even though you had little time to do that yesterday, really, and certainly little time to think about it. You've had overnight, but let me just ask you **[61]** if you, at this point, would share with all of us your personal feelings on the death penalty and then, secondly, your ability or inability to serve on this type of case, if you're called upon, as a juror?

A Well, I believe in the death penalty if a person is found guilty in a capital murder case. For me to arrive at that decision would not be easy. It would be a very heart-felt decision and something that I would not come to easily. But if I believed the Defendant was guilty of the crime, if the evidence was presented and I found him guilty, then—the degree and seriousness of the crime, then I could give the death penalty, but it would not be an easy decision, but it's one I could make.

Q Let me ask you this: I gather from what you're saying that you feel the death penalty is proper under certain circumstances?

A Yes. I don't believe, like I said, in an eye for an eye, but you also have to look at the crime itself.

Q I gather from what you're saying that you think it should be reserved for very

* * * *

[86] DENNIS W. MERRELL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Merrell.

A Good morning.

Q Let me begin, by reintroducing everyone here at the counsel table. My name is Paul Macaluso. To my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q Mr. Merrell, you may recall yesterday when we were all introduced to you, there was another gentleman seated over here and his name is Norman Kinne. He will actually be presenting the evidence on behalf of the State of Texas, if you're a juror on the case, but Mr. Kinne, Jim and I—actually it's Norman. I call him Mr. Kinne. We're assistant district attorneys in Dallas. We're assistants to Henry Wade and we've been designated as the lawyers to represent the State of Texas in this

* * * *

[90] case, okay?

A Okay.

Q So, relax, if you have a question, ask it. If there is a statement that you wish to make at any time, make it, okay, whether I'm talking to you or when I'm through and the other lawyers are talking to you.

Now, let me just tell you what our position is at the outset here, that is the State of Texas. The Judge foreshadowed some of this yesterday, but I want to make our position completely clear, all right?

A Okay.

Q We, that is the State of Texas, are actively seeking the death penalty in this case for this Defendant. We make no bones about it. We want you to know what our position is based on the evidence at the very outset. In other words, we intend to be able to provide you, if you're a juror on this case, as well as eleven others, with both the type of and the quality of evidence that would convince you beyond any reasonable doubt that that man is guilty exactly as he's been indicted and charged in this indictment. **[91]** That's done in the first part of the trial. In the second part of the trial, once again, we intend to provide a jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that all of the questions that will be submitted to the jury in the second part should be answered yes, which you know automatically results in a sentence of death.

MR. WEST: Your Honor, I'm going to object to the improper voir dire pursuant to Article 37.07, subsection G, wherein the code is very specific and I think it should be taken up outside the presence of this juror.

THE COURT: Okay. Mr. Merrell, let me ask you to go out in the hall for just a moment, sir, while we resolve this law question.

(Whereupon, Mr. Merrell left the courtroom, after which the following proceedings were held.)

* * * *

[94] MR. MACALUSO: I don't believe I did. I never have, Judge.

THE COURT: They may be told what the effect of an agreement is either way or, I should say, a failure—if they

vote no, then a life sentence would result. I understand your objection, but I'll overrule it at this point.

MR. WEST: Note my exception.

THE COURT: Bring Mr. Merrell back, Bob.

(Whereupon, Mr. Merrell returned to the courtroom and the following proceedings were held.)

THE COURT: Go ahead, Mr. Macaluso.

Q I've almost forgotten where we left off. I believe I was just telling you basically, Mr. Merrell, what our position is in this particular case. I said our position, of course, would have to be based on the evidence. **[95]** I just wanted to tell you what our position is at the very start of the trial, that we are actively seeking the death penalty in this particular case. Ultimately, of course, it's entirely up to the jury to make that decision.

Now, first, we have this questionnaire that you've completed and that, as the Judge said, saves us a great deal of time. Before we go any further than just my preliminary remarks, let me just ask you—I know you've already answered this in the brief time that you had and in the brief space that you had, but would you share with us at this point, number one, your personal feelings with regard to the death penalty or capital punishment and then, secondly, your ability or inability to actually serve or participate in making a decision on this type of a jury?

A Okay. My personal belief on the death penalty is that it does serve a place in this society. I think it is taken care of by the majority of the people that have made this a law and I go along with that being part of this society. What was the second part of your question, again?

* * * *

[104] DONALD J. HAMBRICK,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Hambrick. Let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Hi.

Q You may recall that we were introduced to you, along with Norman Kinne, who was seated right here. He will actually be presenting the evidence on behalf of the State once the trial begins. Norman Kinne, Jim Nelson and I are all assistant criminal district attorneys here in Dallas and we've been designated as the lawyers to represent the State of Texas in this particular case. Now, to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Hambrick.

MR. HAMBRICK: All right.

* * * *

[107] feelings about the death penalty, capital punishment, all sorts of things, to answer up in front of a bunch of strangers, it might be a little bit inhibiting.

A Yes.

Q So the law allows us to talk to you in this relative degree of privacy. We want you to, as the Judge said, relax as much as you possibly can. Of course, bear in mind that there are absolutely no right or wrong answers to any of the questions you're going to be asked here. Just tell us how you feel. We're going to rely, to a large degree, on you, also, to just tell us, if there's something about your background or your feelings about this type of case that we need to know about, in fairness to both sides, okay?

A Okay.

Q If you have a question, by all means ask it at any time. I know I speak for the other lawyers when they talk to you, as well. If there is something that you would like to tell us about it, just tell us, okay?

A Okay.

Q Now, let me tell you right off **[108]** what our position is with regard to this case. Mr. Hambrick, I want you to know from the very outset here, so it comes as no surprise to you if you're selected as a juror, that the State of Texas is actively seeking the death penalty in this particular case for this Defendant. We're not trying to hide the ball or trying to surprise you later on, if you're on the jury. That's our position. In other words, we intend to be able to provide to you and eleven others, if you're on the jury, both the type as well as the quality of evidence that will convince you beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment.

Then in the second part of the trial because the trial is divided into two parts, once again provide you and the other jurors with the type and the quality evidence that will convince you beyond any reasonable doubt that those questions should be answered yes. You know, if they are all answered yes, whether there be two or three questions, then the law requires the Judge to assess a sentence of death. It's automatic and **[109]** the Judge has no leeway in it. Do you understand that?

A Yes.

Q Okay. Now, that's our position and I'm sure they have a different position. I'm confident of that. Ultimately, of course, it doesn't matter what our position or their position is. It matters what the jury decides on the basis of the evidence. Am I making myself clear?

A So far.

Q Now, with those preliminary remarks—by the way, let me also say one more thing. No one is going to try and talk into or out of a position. No one is going to argue with you or quarrel with you about any honest or conscientious feeling that you have about anything.

A Okay.

Q So don't be afraid to speak your mind on any subject, all right?

A All right.

Q Now, we know you've been asked this question on the questionnaire and you have answered it, but we know you were given **[110]** precious little time, really, on a pretty weighty subject. Let me ask you if you would share with us at this time, sir, once again in your own words, how you feel generally about the death penalty and capital punishment and then your ability to serve and actually participate in this type of a case as a juror?

A Okay. Like I said on my questionnaire, you know, I believe, if somebody takes a person's life, based on—if I'm a juror, based on the facts—you know, if it comes to the point that the death penalty is the proper punishment, then that's what he or she will get.

Q I gather from what you're saying that you do believe the death penalty has a purpose or serves a purpose in our society. How do you view it in that regard; do you think it serves a particular purpose or fulfills a particular need?

A It fills a particular purpose.

Q How do you view that? In what particular manner? Like some people say, well, it acts as a deterrent, you know, maybe gets people who might be thinking about committing a

* * * *

[130] who you are and where you live." That might not be an excuse to murder, but you can see, if I hadn't said that, maybe Mr. Nelson wouldn't have shot me. Do you see?

A Yes.

Q Okay. Even though it's provoked doesn't mean you automatically answer the question no. You decide whether or not there was provocation and was it reasonable or unreasonable because of the person's death. Do you see? You might say, I don't care if he said he could identify him. That's unreasonable for him to kill him, in which case you answer the question yes. Do you see what I'm getting at?

A Yes.

Q It's a little bit confusing, but if it's unprovoked, you answer the question yes and again, as I said earlier, you may not even receive that with those questions. Do you have any questions at all about the three questions?

A No.

Q Okay. Let's shift our thinking for just a second here and shift away from what we've been talking about, capital murder, and **[131]** go back to murder. There's a situation that could arise and I'm not suggesting that it would arise in this case or any particular case, but it's a possibility that we need to discuss with you at this point. Imagine for a moment that you're on this hypothetical capital murder jury. Let's say instead of murder during a robbery, as we've alleged in this particular case, let's say the case involves a murder during a burglary which, as you know, is another type of capital murder. Let's say in the first part of the trial you were satisfied, along with the other jurors, beyond any doubt at all that A, the Defendant, killed B and it was murder, but let's say you had some reasonable doubt where you just didn't believe that the offense was in the course of committing a burglary. Well, you understand that we have to prove both a murder and burglary if we expect you to find the Defendant guilty of what we've charged him with which is capital murder? Do you see what I'm getting at?

A Yes.

Q We haven't done that in that **[132]** situation, have we?

A Not yet.

Q Okay. If that were the situation, you would have to find the Defendant not guilty of capital murder because we didn't prove that. We didn't prove the burglary aspect. Instead, you find him guilty of what we did prove, which would be murder.

A Right.

Q Let's assume we did that. No longer, you understand, is it just automatically death or automatically life. Do

you see? Instead, the range of penalty is as broad as it is for any offense under the laws of this state. Really, it's up to you as a juror in a situation like that basically to tailor the punishment to fit the facts, the Defendant and the crime as you decide it to be and that's all we're asking you to do. In other words, you listen to all the evidence and don't prejudge anything. If you feel, for example, that after hearing all of the evidence—and obviously you haven't heard stick of evidence thus far, have you?

A No.

[133] Q You wait over there and you listen to all of the evidence in your murder case now and, if you feel that the facts call for it and warrant it and justify it, you would have to give the minimum if you felt that was proper to your way of thinking. If, on the other hand, you heard a fact situation and you learned about the Defendant in an offense that you feel calls for and warrants and justifies and where you feel the right thing to do would be to give the maximum, you would do that? Any problem with that at all?

A No.

Q Okay. The range of penalty for murder, regular murder, not capital murder, is as low as five years all the way up to ninety-nine years or life in the Texas Department of Corrections and an optional $10,000.00 fine. Do you know of any reason, sir, why you couldn't assess a penalty somewhere within that range?

A No.

MR. CUNNINGHAM: If the facts and circumstances called for it, Your Honor.

[134] MR. MACALUSO: Yes.

Q That's what I'm saying, of course, where the facts and circumstances called for it and warranted it and you—

A If they called for it, I think I could.

Q Okay. Now, I don't know if the Judge covered this. I don't think he did, but a conviction, whether it be for capital murder, murder, or any other offense that I know of

other than treason, I think, can be had on the testimony of one eyewitness to the crime if a jury believes beyond a reasonable doubt the testimony of that eyewitness. In other words, you can in certain types of crimes that there may only be one remaining witness, a rape case, for example. A lady that's been raped and she identifies somebody, the law says if you believe that individual, whether it be a rape case or a murder case, beyond a reasonable doubt, the person who identifies somebody, you can base a verdict on that. There is any reason why you couldn't do that, Mr. Hambrick?

A Well, I'm not going to base my—you know, my basic conviction on just one

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[152] EMILY C. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Hi, Ms. Williams. My name again is Jim Nelson as I was introduced to you want to take just a couple of minutes to reintroduce everybody who is sitting here. Beside me is Mr. Paul Macaluso. If you will remember yesterday, we were introduced to you as a group and sitting right about there was a gentleman by the name of Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district attorneys here in Dallas. We were assigned by Mr. Wade to handle this particular case and that's what we're going to do. Mr. Macaluso and I will pick the jury and Mr. Kinne is going to be responsible for putting on most of the evidence.

To my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[155] you think we can do that?

A Yes.

Q Okay. Are you starting to relax a little bit?

A Yeah.

Q Okay. Good. Now, as I've mentioned and you've heard three or four times already, this is a capital murder case and I want you to know right now up front as we, go into this that the State of Texas is going to actively seek the death penalty for this man sitting at the far end of the counsel table in this case. We feel like and we plan to present evidence to you that will convince you beyond a reasonable doubt that he's guilty of the offense of capital murder and that the three questions on those boards right there should be answered in the affirmative with a yes answer. Three yes answers there result in the death penalty under the law of the State of Texas. I feel like you have a right to know going in what we're planning on doing and what our opinion is in this case.

Ms. Williams, I noticed on your information sheet that you filled out here **[156]** yesterday that you answered a little bit on the death penalty your feelings, but I know you didn't have much time to think about it and you were kind of under a pressure situation at that time. I hope you've had a chance to think about it a little bit more overnight. I'm just going to ask you right now what your feelings are about the death penalty. Are you in favor of it or against it? How do you feel about it?

A I'm in favor of it.

Q Okay. You understand, I think, Ms. Williams, from the things that the lawyers have said that there are certain situations where the death penalty is deemed proper under Texas law. Number one, just a plain murder, knowingly or intentionally causing the death of another individual is not a death penalty offense in this state. It has to be coupled with certain situations. For example, it has to be the killing of a police officer or a fireman in the lawful discharge of his duty or the killing of more than one individual, which is a new law

that was just passed this last year. It can also be certain situations where, if it's a killing in conjunction with a robbery -

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[176] just on emotion say, well, this man deserves to die for what he did. You have-to answer each of those three questions based on the facts that are brought to you. Do you feel like you can do that?

A Yes.

Q Do you feel like, if we didn't prove to you that one of those was true, you could answer it no?

A Right.

Q I think what you told us before, you're going to have to hear the evidence before you could make that decision; is that right?

A Yes.

Q I think that's all either side is going to ask you to do, Ms. Williams, is listen to the evidence and make a decision as to these facts based on that evidence, okay?

A Okay.

Q Now, there may be a situation—we don't anticipate it in this case, but there may be a situation where capital murder is not proved, but murder is proved. Do you remember I talked about if we don't prove committing **[177]** or attempting to commit robbery, then it's just a simple offense of murder?

A Yes.

Q The range of punishment in that case would be anywhere from five years up to ninety-nine years or life and you could assess an optional fine of up to $10,000.00. Now, in order for you to be qualified to serve as juror, you have to tell us that you could consider that entire range of punishment if the person were found guilty of murder rather than capital murder. You understand that there can be several levels or different types of murders, several different ways

that a death of a person can result. Do you feel like you can consider anywhere from five years up to ninety-nine years or life for the offense of murder?

A Yes.

Q Okay. You don't have any problem with that then? If you feel like five years is called for and justified by the circumstances, you could assess that and, if you feel like life or ninety-nine years is called for and justified by the circumstances, you could assess that?

[178] A Yes.

Q Okay. Now, you understand also, Ms. Williams, that we don't have to prove to you motive or premeditation in any murder case. That's not an element in a case. You know, you watch on TV and they talk about motive or was it premeditated, so that makes it first degree murder and so on and so forth, but we don't have to prove that in Texas. We don't have to prove what the motive was for the killing and we don't have to prove any type of premeditation. Do you have any problem with that?

A No.

Q Okay. We've talked a lot about evidence and about how you're going to have to base your verdict on the evidence and obviously that's what we want you to do. You can't make a decision sitting there right now because you haven't heard anything yet. That evidence is going to come from witnesses on the witness stand and you're going to have to judge the credibility of those witnesses. What we ask you to do there is give each witness an equal starting point. I envision it kind of like

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[196] DAROL L. WEIGANT,

called as a jury panel member having been sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Mr. Weigant, let me begin by reintroducing everyone here. I'm Paul Macaluso. I'm an assistant criminal district attorney along with Jim Nelson to my immediate left. You may recall that Norman Kinne was seated over here yesterday we were all introduced to you. I don't believe we've ever met. I know you work for the sheriff's office, but I don't believe we've ever met. We may have seen each other in passing in the halls.

A I've never see [sic] you.

Q All right. You know that we work for the district attorney's office and we represent the State of Texas in this particular case. We're the lawyers for the State, as you well know. To Jim's immediate left is E. Brice Cunningham.

MR. CUNNINGHAM: How are

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[203] charged with capital murder, as I'm sure you know, can receive only one of two possible penalties, life or death. It depends on the answers to the questions and the way the jury decides to answer them.

We are actively seeking the death penalty in this case, Mr. Weigant. That is, we intend to be able to provide a jury with the type and quality of evidence that is going to convince them beyond a reasonable doubt that the Defendant is guilty in the first part of the trial and in the second part, provide them with the type and quality of evidence that will convince them beyond a reasonable doubt that the questions all should be answered in the affirmative, yes, yes, yes in each case, which as you know results in the Judge assessing a sentence of death. Now, the jury may disagree with this. That's why we have a jury up here. That's our position and I think it is only fair to you, certainly, and to anyone else who is a prospective juror in this type of a case to more or less acquaint them with or put them on notice of what our position is relative to the evidence bearing in mind naturally that it is **[204]** up to you and the eleven others that will be on this

jury to make that ultimate decision. There will be two decision, [sic] actually.

Now, you've indicated here on question fifty-six—and there are only three lines provided there for you to express your feeling about the death penalty and then two or three other questions about whether or not you could sit on this type of a jury and you answered those. Could you share with us your personal feelings about the death penalty and your ability to actually serve on this type of a case and actually make those decisions that might result in the execution of this man right down there? How do you feel about the death penalty? I know you said you believe in an eye for an eye and you believe it's a deterrent.

A I believe that they should have the death penalty for any premeditated murder.

Q All right. You understand that's not the law?

A I know that.

Q Let me just hit on that while we're on it. There are some aspects of the law that I don't agree with and I'm sure there are

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[228] that would be true, also. You could be on a case and hear a fact situation- where you personally don't think that individual ought to receive—you know, if you could vote directly, you would say, "I don't think that person ought to get the death penalty.", but when you come to analyzing the evidence, let's say it does fit, the evidence actually fits those questions like a glove, each one of them was proven to you beyond a reasonable doubt to be yes. Do you see that would be contrary—

A I would have to answer yes.

Q Even though you personally desire a life sentence, if you could do it that way?

A If they were all yes. It would have to be yes or I couldn't.

Q Well, you would be guided by the evidence as to whether it called for a yes or a no answer?

A Yes, sir.

Q Let me shift gears here for one second. I know the Judge is looking at me and I don't blame him because I'm going over my time limit. Let's shift our thinking for one second to two matters. One is a situation here **[229]** where, if you're on this imaginary jury, let's say you have heard all the evidence in a capital murder case and let's say it's murder during a burglary, all right? Let's say you're satisfied that A killed B and there's no doubt about it, but let's say you didn't hear any evidence about the burglary at all or you had a reasonable doubt about that, all right? You understand for you to convict someone of capital murder, we have to prove both aspects of capital murder, both the murder and the burglary?

A Yes, sir.

Q All right. We didn't prove the burglary, did we?

A No, sir.

Q All right. So you can't convict him of capital murder. Instead, you convict him of what we did prove, which was what?

A Murder.

Q If you did that, then you forget about mandatory life sentences or death. It's a first degree felony murder and all the law expects you to do in a situation like that, in a murder case, is to be open-minded and do **[230]** what you've told us you would do already and that's simply say, "I will listen to all of the evidence in a murder case and, if it's a proper case, after I've heard the evidence, that I feel calls for a particular type of punishment to my way of thinking after I've heard all the evidence, then that's what I will give. If it is what I think calls for the minimum, I'll give the minimum. After I've heard all the evidence, if I think it is proper and just and the right thing to do to give the maximum, I'll give the maximum, whatever it may be. Can you do that?

A Yes.

Q Now, you know that the range of penalty for murder is as little as five years up to ninety-years or life. You don't have to imagine a case that would call for five years or one that would call for ninety-nine years or life, but are you able to tell us that, if you see a fact situation in a murder case that, to your way of thinking, calls for the minimum, you could give, five years in the Texas Department of Corrections for murder? If you see one that calls for ninety-nine years or **[231]** life, you could do that as well and even add on a $10,000.00 fine? Can you do-that?

A Yes, sir.

Q In other words, you will wait until you hear all the evidence?

A Yes, sir.

Q One other thing and then I'll let the other lawyers talk to you. Obviously, we discussed earlier that you are a sheriff's deputy. I anticipate that there will be other law enforcement officers testifying. You do not apparently know or think you know any of these? You understand that the law expects any juror to judge any witness by the same yardstick regardless of that witness' station in life, occupation, the color of their clothing, color of their skin or anything else?

A Yes, sir.

Q Can you do that?

A Yes, sir.

Q In other words, you know as well as I do. You've worked with law enforcement officers and you know they're capable of telling the truth and, I guess, some of them are capable of lying because they're just human

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[332] MARY I. SUMROW,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sumrow. As I was introduced to you on Monday, my name is Jim Nelson. I'm an assistant district attorney in Dallas and I want to reintroduce everybody here. Right next to me is Mr. Paul Macaluso. I think you will remember Monday that another gentleman was sitting with us at about that corner of the counsel table by the name of Norman Kinne. The three of us are assistant criminal district attorneys in Dallas and we've been assigned by Mr. Henry Wade, our elected district attorney, to handle this case for him in this court and that's what we're going to be doing. Seated to my left, immediately to my left, is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q Next to him is Mr. Royce West.

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[354] irate about what had happened or whatever that would take—if you felt that the person should get death, yet we failed to prove that the answer to question number one was yes, could you answer that question no?

A Yes, I could.

Q Even knowing that would result in a life sentence rather than a death sentence that you wanted emotionally, you feel you could intellectually set that aside and answer that question no because that was what the evidence showed?

A Yes, I could.

Q Okay. There's no question about that in your mind?

A No, none at all.

Q That's we're asking you to do, Ms. Sumrow, is base your verdict on the evidence and not your emotions.

A Right.

Q Now, there is always a chance in a case like this, although we don't expect it to happen, that all will be proved will be the offense of murder. Let me give you a hypothetical example. Let's say we've got a **[355]** murder committed in the course of a burglary case. Let's say we prove to you that the Defendant in that case knowingly or intentionally caused the death of another individual, but we don't prove anything about a burglary, nothing about a burglary at all, then it's your duty, is it not, to find the Defendant guilty of the offense of murder?

A Yes, it is.

Q Okay. Knowing or intentionally causing the death of another individual. As I said, the death penalty is not an option in that case. The punishment range is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. Now, would you agree with me that there are—and I can't go into examples, but there are several or a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual. A multitude is about the best word I can think of of situations in which that could happen. Again, we aren't talking about self-defense and we aren't talking about accident or something like that, but still a multitude of circumstances. **[356]** That's why murder has the widest range of punishment than any Texas law allows, anywhere from five years up to ninety-nine years or life.

Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider that entire range of punishment for murder. You don't have to tell us right now what you would assess because obviously you haven't heard the facts. You don't know what the facts are. What you have to be able to tell us is, that if, after you've heard all of the evidence you're going to hear, you feel that the facts and circumstances justify and call for a sentence of ninety-nine years, you would give it. At the other end, you have to be able to tell us that, if you feel that the facts and circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or

forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would **[357]** justify life or something in between. You do have to be able to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified. Now, can you do that for the offense of murder?

A Yes, I could.

Q As I've said over and over again, what we're going to ask you to do is base your verdict on the evidence as you hear it and keep an open mind until you've heard all of the evidence, everything you're going to hear, before you make the decision because we want you to base your decision, base your verdict, on that evidence. I believe you're telling us you can do that; is that right?

A Yes.

Q Okay. If that evidence justifies five years or calls for five years, you will give five years; is that right?

A That is correct.

Q If the evidence calls for sixty years, you will give sixty. If it calls for **[358]** twelve years, you will give twelve. Whatever it is in that range, you can consider the entire range based on the law and the evidence; is that right?

A I believe that's correct.

Q Okay. Now, the law allows the Defendant to either testify or not to testify. It's his option. If he wants to testify, no one can stop him. If he doesn't want to testify, no one can make him testify. If he does not testify, you can't consider that. You can't talk about it in your deliberations and it can't come across your mind at all that he didn't testify or why he didn't testify because he has an absolute right under the Fifty Amendment of the constitution to not testify. Do you have any problem with that?

A No, I don't.

Q If he does testify, you could judge him as you would any other witness; is that right?

A That's correct.

Q All the witnesses, basically, Ms. Sumrow, start out at the same point. It's kind of like race. Everybody starts out at the

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[392] A I do not see how it would, no.

Q Are you sure about that?

A I feel sure about it.

Q No vacation plans?

A No, sir, not until the summer.

MR. WEST: Nothing further, Your Honor.

THE COURT: Thank you, Mr. West, Mr. Nelson, Mr. Macaluso.

MR. NELSON: Your Honor, we would be very pleased to have Ms. Sumrow serve as a juror on this case.

MR. WEST: Your Honor, I guess I'll have to concur with Mr. Nelson and we would be very pleased to have Ms. Sumrow on this case, also.

THE COURT: Ms. Sumrow, Let me ask you—I'm going to give you an oath as a juror in this case. You have been accepted by both sides.

(Whereupon, the juror was duly sworn by the Court.)

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[478] MARGARET M. GIBSON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Gibson. Let me begin by reintroducing everyone here. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Good afternoon.

Q You may recall being introduced as well to Norman Kinne. He was seated over here. We are all assistant criminal district attorneys in Dallas and we're assistants to Henry Wade who, I'm sure you know, is the district attorney for the next ten months or so. We've been designated to represent the State of Texas in this particular case. To Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Gibson?

MR. GIBSON: Very well,

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[482] punishment. Do you see what I'm getting at?

A Uh-huh.

Q As I said earlier, all we want to know is exactly you feel or any juror feels with respect to the potential service on a case of this magnitude.

Now, let me tell you right off what our position is and that is the position of the State of Texas with regard to this particular case. Ma'am, we are actively seeking the death penalty in this case. The State of Texas here in Dallas County is actively seeking the death penalty for Thomas Joe Miller- El. That is, we intend to be able to provide the jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt, in the first phase of the trial, that the Defendant in this case is guilty exactly as he has been charged with capital murder.

Then in the second part of the trial, we intend to be able to provide a jury with both the type and the quality of evidence that would convince the jury beyond any reasonable doubt that those questions that will [483] be submitted to the jury in that phase of the trial should be answered yes. I'm sure you may recall from the remarks of the Judge, all

yes answers, two or three, whatever the number of questions you get, all yes answers will require Judge McDowell by law mandatorially to sentence the Defendant in this case to be executed by lethal injection down in Huntsville, Texas. The reason I'm telling you that is not to—well, just to be fair with you basically, to tell you what our position is.

Ultimately, of course, our position really isn't what controls, you understand that, it's the findings of the jurors who ultimately will comprise this jury. I think it is only fair to let you know what our position is up front, that we are actively seeking, at the end of this trial basically, that this man be taken down to Huntsville, Texas and put to death. Like I said, it would be unfair of us not to let you know that, what our position is.

Now, you have been asked here about your position and your feelings about the death penalty. As I said, no one will quarrel **[484]** with you. No one is going to make anybody serve on a jury, for example, if they have a strong type of either religious, moral or personal convictions that would prevent them from participating in this type of a case. Let me just tell you that right off. That's why we get to ask you these questions now, to clarify certain things, so that you ultimately can tell us—I'm saying tell us, you're really telling all of us. Even though you're looking at me now and I'm asking the questions, they're listening to everything you have to say as is Judge McDowell, as is the court reporter who is taking down everything for appeal purposes.

No one is going to try and put you in a position that is untenable, be it strong, religious or whatever feelings there may be that could prevent you from actually serving on this type of a jury. Now, let me just ask you before we go any further. I know you've been asked this question on three lines here. Fifty-six was, do you believe in the death penalty. Let me just ask you, if you could in your own words, to share with us your personal feelings about the death penalty and capital **[485]** punishment and then, secondly, probably just as important, your ability or inability to actually on a jury of

this type and render a decision or actually participate potentially in the execution of the Defendant?

A I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything. It's the ultimate punishment and it's part of the law and, if the law so renders the death penalty, I can't stop it, but I personally do not believe in it.

Q Is this for any particular reason? Is this a personal feeling that you have about it or—

A It's a personal belief.

Q All right, have you felt this way for some number of years or just—is it something you've thought about, you know, more seriously, of course, when you were asked or informed that you were going to be a prospective juror on this type of case?

A Oh, I think I answered that my gut reaction was that I don't believe in it and I never really thought much further than that. I

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[492] Q Regardless of the evidence and regardless of the facts. You could vote for something else, maybe a life sentence?

A Yes.

Q Or some number of years, but never death?

A Never.

Q Okay. About thirteen years ago, the law changed. It's no longer done that way. It's not done directly, but the procedure up to that point is largely the same. You know the evidentiary phases are the same, the same type of testimony largely is admissible, basically the same types of offenses, you know, very serious types of crimes. In this case, now, it's murder. In some instances it must be murder of a particular class of individual or murder plus another offense. A murder and a robbery is alleged in this indictment. A murder during rape, kidnapping, arson, burglary. The dif-

ference comes in at the very end of the trial when you go back to decide—make certain decisions. It is no longer decided directly. Instead, as the Judge told you on Monday, you take back with you two or

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[506] put aside your personal feelings?

A Yes, I do.

Q I think you've already said you could do that. Do you understand that the convex of that is just as true? Let's say you heard a case where you said, if I could vote, as you've said, I would never, ever vote for a sentence of death. It's a capital murder, but it's not the type of capital murder that anyone should be executed for, but in all intellectual honesty, number one, they proved that to me. I'm being honest about it. It should be answered yes and number two yes and number three yes. Would you go ahead and do that and put aside your personal feelings?

A Yes, I could.

Q Now, let's shift gears here for just a second in the time that I have remaining and let's talk about a situation that I'm not suggesting would occur in any case, much less this one. It's a situation where, again, hypothetically Ms. Gibson is on a jury and it's a capital murder case. Let's say it's a capital murder and it's murder during a burglary, as an example of another type of a **[507]** capital murder. Now, let's say that you have heard all the evidence in the first part of the trial, the first phase of the trial, the guilt or innocence phase, and you and the other jurors have no doubt whatsoever that the Defendant in that case committed murder, but you didn't hear any testimony about a any burglary or you have a reasonable doubt about it. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both components of the offense, a murder and a burglary? Am I making myself clear?

A Yes, sir.

Q We didn't do that though, did we?

A No.

Q So you can't convict him of capital murder. You can only convict him of what we proved to you and that's the offense of murder. Were that to happen, were you to convict someone of murder and not capital murder, but just murder under the laws of Texas, then you forget all about death, mandatory death and mandatory life. The range of penalty for murder is very broad. In fact, **[508]** it is as broad as any range for any offense under the laws of the State of Texas.

Now, let me talk to you a little bit about what murder is and what murder is not. Murder basically is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or legal justification. You see, you can kill somebody under certain circumstances and it's not murder. In fact, I'm going to cite four examples for you right now. For example, you can kill someone in self-defense. You could be charged with murder, but you—let's say, if I was charged with murder and you were on my jury and you believed that I acted in self-defense, reasonable self-defense, you would have to find me not guilty. Do you understand that?

A Yes.

Q Because I would have to find you not guilty if it was I on your jury. You can kill somebody—you have a right to self-defense and so do I. We're not thinking about murder when we talk about the range of penalty. We're not talking about self-defense when we **[509]** talk about that sort of thing. That's not guilty. It's no offense.

The same thing would hold true if you believed that someone charged with murder acted accidentally. It was an accident. The gun fell or the gun went off accidentally or however it was. That's not murder, either. That's not guilty if you believe that—or if you felt someone was insane. As much as people get up in arms about the insanity plea these days, if you honestly believe or have a reasonable doubt that the person charged with murder acted because he was insane, you have to find him not guilty. It's not murder. If it's a situation where someone killed somebody in the act of sud-

den passion, in other words, the heat of sudden passion, that's not murder, either. In other words, if a father were to come home, God forbid, and find out that his little daughter had been sexually abused by a neighbor and the neighbor was up the street laughing about it and he goes into a rage. He flies off the handle, picks up a gun, runs down the street and kills the neighbor. The law doesn't excuse that. Some people think it is **[510]** temporary insanity. The law doesn't excuse that behavior, but it doesn't call it murder. If you believe those facts and you're on a jury, you wouldn't convict that individual of murder because it is not murder. It's voluntary manslaughter basically. Do you see what I'm getting at?

A Yes.

Q What I'm saying is, I want to draw a clear distinction between what murder is and what murder is not when we talk about the range of penalty, that broad range of penalty. Again, I don't want to dip back into the cliche bag, but the law expects a juror to be able to tailor the penalty in a murder to fit the facts as they decide them to be.

Let me ask you: Erasing the self-defense, erasing the accident, erasing insanity and erasing the crime of passion, let me ask you, what do you personally feel the minimum penalty ought to be for someone who knowingly and/or intentionally causes the death of another individual, commits murder? What do you feel the minimum penalty ought to be under any facts and circumstances?

[511] A I don't know. I've never thought about it before.

Q All right. Let me ask you this: The range of penalty under the laws of the State of Texas is as low as five years, as high as ninety-nine years or life and an optional $10,000.00 fine and the law expects a juror, if they can in all honesty, to be able to set the penalty to fit the facts after they've heard all the evidence, if they can. Erasing those other qualifications, they don't mitigate a murder by saying, "I think he might have been insane and I'll give him five years." If you

think someone is insane, you forget about it and you find him not guilty. Am I making myself clear?

A Yes, sir.

Q I just want to make sure you're not considering those things. Let me ask you: Do you believe you could ever set a penalty as low as five years if you felt the facts and circumstances warranted it? In other words, do you feel, whatever the set of facts and circumstances to your way of thinking would ever justify a sentence as low as five years in **[512]** the Texas Department of Corrections for a knowing and intentional murder?

A Yes.

Q Okay. I gather, if you heard facts and circumstances that called for a sentence as high as ninety-nine years or life, could you do that?

A Yes, I could.

Q And even an option of a $10,000.00 fine?

A Uh-huh.

Q One other matter. Let me ask you this: Could you—the law allows the State to prove either a capital murder or a shoplifting case or a rape case or whatever the case may be using the testimony of one eyewitness to the case. If you believed the eyewitness and you believed the eyewitness is capable of testifying as to all the allegations contained in the indictment—okay?

A Uh-huh.

Q Like I say, whether it be a capital murder or whether it be shoplifting a package of chewing gun, how do you feel about that? Do you believe that in a case of this

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[523] please.

(Whereupon, Ms. Gibson left the courtroom, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, I hold the juror is qualified. You-all may want to discuss what you want to do.

MR. MACALUSO: Judge, we would be pleased to exercise a preemptory challenge.

THE COURT: Bring her back in, Ted.

(Whereupon, Ms. Gibson returned-to the courtroom and the following proceedings were held.)

THE COURT: Ms. Gibson, you've been excused from service in this case, which means you can leave here and go back to your job, your home or whatever. I'm not going to let that happen though without thanking you for

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[527] CAROL A. TAYLOR,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Taylor. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me is Paul Macaluso. I think you'll remember that on Monday there was a gentleman sitting right at the corner of that table. His name is Norman Kinne. The three of us are assistant criminal district attorneys here in Dallas. We've been assigned to present the evidence for the State of Texas in this case. Seated to my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Taylor?

MS. TAYLOR: Fine.

Q To his left is Royce West.

MR. WEST: Good afternoon, Ms. Taylor.

Q These two gentlemen have been

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[529] myself clear on anything.

You're a prospective juror in this case. We have one juror at this time. We need eleven more. What we're going to try to do in the next few minutes is get to know as much about you as we can in a little bit of time. In order to do that, we're going to as some questions that—I'm going to ask you for some personal feelings about things and that's part of the reason, I think, you're in here by yourself rather than with the entire group as you were on Monday. I didn't notice, but have you been on jury service before, ma'am?

A No.

Q If you have been, you would have probably spent most of your time in a group out here with forty or fifty other people and we would have talked to you in that situation rather than individually. Since this kind of case has so many weighty issues in it and it calls for some very strong personal opinions, we feel like maybe you could be a little bit more open this way and we hope that you will be.

I want you to know right up front [530] what the position of the State of Texas is in this case. We are now and are going to continue to actively seek the death penalty for the man at the far end of the counsel table, Thomas Joe Miller-El. We feel like you have a right to know that so you'll know what you're dealing with going in. We plan to present to you sufficient evidence for you to find beyond a reasonable doubt that he's guilty of the offense of capital murder and we plan to give you the type and qualify [sic] of evidence to convince you that you can answer each of those three questions yes, along with the other eleven jurors that serve on this case. The result, if you and your fellow jurors answer each of those questions yes, is going to be an automatic death penalty for this Defendant. So that's where we are.

Now, I notice in looking at your questionnaire—I know you did this in the hallway or at lunch or something and didn't have a whole lot of time to look at it or think about it, but there was a question on there about the death penalty. I'm going to ask you again, if you would, to just tell us how you [531] feel about the death penalty.

A. Well, let's see. I've never, you know, had to make a stand on this before, so when I was asked, I thought, yeah, I think I do believe that, if someone has committed a crime that's bad enough that the Court's think that he should be put to death, well, yes, I think that he should be because he doesn't need to be out in society any longer. I think the Bible says an eye for an eye.

Q You feel like it serves a purpose then; is that right?

A Yes, I do.

Q Okay. Would that purpose be—you've mentioned taking him out of society. Is there also a deterrent effect?

A You mean like life in prison or something like that?

Q Well, no. What I'm asking is, do you feel the possibility of the death penalty or the fact that it is there might be a deterrent to persons who are considering committing certain types of crimes?

A They should think about it, but I don't think it's used quite enough that it

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[548] Now, something we don't expect to happen, but that might happen is, a person would just be proved guilty of murder. Do you remember that I told you that we had to prove both the murder and it was in the course of committing robbery?

A Right.

Q Well, let me use a hypothetical. Let's say we have a person who is charged with capital murder during a burglary and we prove to you that he either knowingly or intentionally caused the death of another human being, but we didn't bring you any evidence about a burglary at all, just nothing about a burglary. Now, we haven't proved capital murder in that case, have we?

A It depends on what you're defining as capital murder.

Q Remember that I told you, for it to be capital murder, it has to be murder in the course of another offense.

A Right.

Q We aren't talking about killing a police officer or killing a fireman, but if all we prove that he caused the death of another individual, then that's just murder?

[549] A Right.

Q Okay. Murder in the State of Texas carries a punishment range of anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. There's no death sentence in just a regular murder. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire range of punishment for the offense of murder. Now, I can't give you any examples, but I think you would probably agree with me that there are a multitude of situations in which one person could cause the death of another person knowingly or intentionally. Even though it's not self-defense and it's not an accident and it's not justified in any way, there's still a multitude of background and surrounding circumstances that could come into play in something like that. Would you agree with me about that?

A Yes, I do.

Q Okay. What we need to know from you, Ms. Taylor, is whether—if you feel, after hearing all the evidence, that the facts **[550]** and circumstances justify a sentence of ninety-years or life for murder, could you give it?

A Could I give—

Q Yes, could you give it, if that's what the facts and circumstances called for?

A Yes.

Q Okay. Let's turn it around. If you felt, after hearing all the evidence, that the facts and circumstances called and justified a sentence of five years for the offense of murder, could you give that?

A Yes.

Q Okay. We aren't asking—

A I don't understand why you're asking me.

A Well, you have to us that you're able to consider the entire range of punishment. There are some people who might come in here and say, "No, there's no way I can give ninety-nine years for a murder case. I just can't do it. It's too long and I don't feel it's right." or the same thing on the five years. We have a right to know and the defense has a right to know that, since the legislature has set that entire range of punishment, you **[551]** could consider that entire range.

A Right. Sure. They know about the laws than I do and whatever they say, yes.

Q Okay. Now, basically what we're going to ask you to do on the guilt or innocence phase and on the punishment phase is to listen to the evidence and base your verdict on the evidence. Now, can you tell us that you will keep an open mind as to all the evidence in this case and not make a decision until you've heard all of the evidence?

A Sure I will.

Q And base your verdict on all that evidence after you've heard it?

A Right. Yes.

Q Okay. Now, we don't have to prove—let me back up. TV shows and that kind of thing, you hear a lot about motive for murder, premeditated murder. I understand that may be the law in California. I don't honestly know, but here in Texas, we don't have to prove to you what the motive was for a murder or for any other crime, for that matter. We don't have to prove to you that it was premeditated in any way. Do you understand that?

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[598] JOHN D. NELSON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the .whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Dr. Nelson, good morning. Let me begin by reintroducing everyone here at the tables, or most everybody here. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning, Doctor.

Q Way back on Monday when we were first introduced, there was another gentleman seated here. His name is Norman Kinne. The three of us are assistant criminal district attorneys here in Dallas. We work for Henry Wade who, I'm sure as you know, is the district attorney here in Dallas. We've been designated as the lawyers to represent the State in this particular case. Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[603] the better citizens because they have a certain feeling about the death penalty than those who do not.

What we want to know ultimately at this time is how Dr. Nelson feels, okay? I know you've been asked this question, number fifty-six, about how you feel about the death penalty and we've given you three lines there to answer that and precious little time to think about it really. Would you share with us your feelings, Dr. Nelson, your personal feelings about the death penalty and then, secondly, your ability or inability to actually serve on a case like this and render a verdict that would result in the execution of this Defendant in this case?

Before you do that, I forgot one thing. I'm going to state one thing at the beginning. The State is actively seeking the death penalty in this case. We think it only fair to tell all the jurors initially what our position is with regard to this case. We are actively seeking the execution of Thomas Joe Miller-El for the offense for which he's been accused and indicted. That is, we intend to be **[604]** able to provide a jury, once it's

selected, with the type and the qualify of evidence, Doctor, that would convince a jury in the first phase of the trial that Mr. Miller-El is guilty exactly as he's been charged with the offense of capital murder. Then, as you know, in the second phase of the trial where the penalty is actually returned, once again we intend to be able to provide a jury, once it's selected, with the type and the qualify of evidence that would convince them beyond any reasonable doubt that those questions should be answered yes. You know that the result of three yes answers is an automatic sentence of death, a mandatory sentence of death under the law. The Judge has no power, of course, to override that. Now, that's our position, but, of course, ultimately it's the position of the jury that controls, but I think it's only fair to tell you in all honesty and as straight forward as we can what our position is and what we're seeking and ultimately that is, at the end of this trial that Mr. Miller-El be put to death under the law. Now, let me just go back to the question I asked you earlier. Would you share with us **[605]** your feelings about the death penalty and your ability to actually serve on this case, if you can?

A Yes, sir. Before I do that, I made an error on that questionnaire that's been bothering me since Monday. There was a question whether any members of my family or close friends or lawyers and I said no. I forgot about my nephew who is a city attorney in Duluth, Minnesota.

Q He's a city attorney?

A In Duluth, Minnesota.

Q Thank you for telling us that. You didn't commit even a misdemeanor by not putting that on there. Go ahead.

A I do not believe in the death penalty. I suppose this goes back to my childhood because both my parents felt rather strongly against the death penalty. I just believe – for two reasons, probably; one, morally I don't think it's right to take anyone's life. I don't care what the reasons are. Secondly, the law isn't perfect and there are always chances for errors to be made.

Q Okay. You've stated your position

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[668] HAROLD K. SOHNER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning. Is it Mr. Sohner; is that correct?

A That's correct.

Q I think I was introduced to you on Monday. My name, again, is Jim Nelson. I'm going to reintroduce the other folks here. Sitting next to me is Mr. Paul Macaluso. The other gentleman who was seated over here at the table the other day, if you remember, was Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are assistant criminal district attorneys here in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Sohner?

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[670] sometimes. If you have something that you need to say or a question on some issue I haven't made clear, please stop me and let's make sure that we're clear on things, okay?

A Yes.

Q Mr. Sohner, I feel like it is only fair to you that you know up front what our position, the position of the State of Texas, is in this case. Our position is that we are actively seeking and will continue to actively seek throughout the trial the death penalty for that man at the far end of the counsel table, Thomas Joe Miller-El. We plan to present to the jury and to you, if you're on the jury, a sufficient amount and qualify of evidence, number one, for him to be found

guilty of capital murder and, number two, for the death penalty to be assessed. I feel like it is only fair, as I've said, that you know that going in, that that's what we're going to try to do. I'm not going to try to pull the wool over your eyes. Although I'm a lawyer and have been for a few years, I'm going to try not to talk too much legally or too much lawyer talk and I'm not going to argue with you. I don't think **[671]** anyone is. We certainly don't mean to. Obviously, there aren't going to be any right or wrong answers to what any of us have to ask, Mr. Sohner. We're just trying to find out—I've expressed to you our feelings and we need to know—and Mr. Cunningham and Mr. West and the Judge are going to listen at the same time as I'm talking to you—your feelings on things because that's what is going to count. Obviously, we're trying to find the twelve people best suited to serve on this particular jury in the trial of Thomas Joe Miller-El.

With that kind of introduction and opening, which tends to run a little long sometimes, you had a chance on Monday to fill out a questionnaire. One of the questions on there, as you probably remember, was number fifty-six and that's your feelings about the death penalty. You filled it out at that time and I would like you, if you would, to tell us again today exactly what your feelings are about the death penalty?

A It's a situation that I—until one is put into the position of answering that question and saying I'm going to be one of the

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[723] BILLY J. WAGONER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Wagoner. Mr. Wagoner, let me begin by reintroducing every one here at the table. My name is Paul Macaluso and to my immediate left. is Jim Nelson.

MR. NELSON: Good afternoon, Mr. Wagoner.

Q Mr. Wagoner, you may remember, on Monday when we were all introduced to you, there was a man seated over here. His name is Norman Kinne. Mr. Kinne, Mr. Nelson and I are assistant criminal district attorneys here in Dallas. We work for Mr. Henry Wade, who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State of Texas in this case.

Now, to Jim's immediate loft is Mr. Brice Cunningham.

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[728] question that you want to ask?

A No.

Q If there is something that you wish to add or a statement you wish to make because it was not asked by the right questions, if there's something you need to tell us, then by all means tell us, if you feel it's going to affect your service as a juror, okay?

A Okay.

Q Now, let me tell you where we stand on this case, that is the State. We are actively seeking the death penalty in this case, Mr. Wagoner. In other words, we intend to be able to provide the jury, once it's selected somewhere down the line, with the type and quality of evidence that would convince them beyond a reasonable doubt under the law that the Defendant is guilty exactly as he is charged in this indictment. That's our burden. We have to do that and we intend to do that in this case based on the evidence.

In the second part of the trial when the penalty is determined, once again we intend to be able to provide the jury in the **[729]** case with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever, which again we have to do, that those three questions

that determine life or death should be answered yes. Like the Judge said the other day, if all the questions are answered yes in the second part of the trial, then the law requires that he assess a penalty of death for the Defendant. That's just our position. The reason I mention that is just to be fair to you and tell you up front where we stand with regard to the evidence. You understand from your other service what the lawyers think really doesn't matter. It's what you, as a juror, thinks and the decisions you make based on the evidence.

Now, let me just ask you, Mr. Wagoner, I know they asked you this question on the questionnaire, but let's just talk about it a little bit again. Let's just have a little informal discussion here, if we can. Tell us how you feel generally speaking, in your own words, about the death penalty and capital punishment. How do you personally feel about it?

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[754] the questions based on the evidence that you hear?

A Yes.

Q Do you see what I'm getting at? In other words, you could be on a jury and you could say, well, I think that person ought to die, you know, if I could vote, I'd probably vote for death, but the law doesn't allow you to do that, does it?

A I wouldn't want it to.

Q The law expects you to simply answer the questions on the basis of the evidence and put aside your personal feelings and just answer the questions. That's all.

A Very much so.

Q Can you do that?

A Yes.

Q Let's shift gears for just a second because I don't have a whole lot of time left. Let me talk to you about a situation—and I'm not suggesting that this would happen in this case, for a minute, but we have to discuss it now. Let's

imagine for a moment that Mr. Wagoner is on a jury. Okay. Just imagine it for a second. A. capital murder jury **[755]** and let's say we've accused somebody of committing murder during a burglary, that's capital murder that we've proven. Do you a understand that we have to prove both the murder and a burglary if we expect you to find him guilty of capital murder?

A Yes, I understand that.

Q But let's say at the end of the testimony, you say, well, I believe he committed murder. They proved that all right. Sure thing, but they didn't prove anything about any burglary or I doubt it was during a burglary. Well, you see, if that were to happen, you have to find that Defendant not guilty of capital murder. Do you understand that?

A Yes.

Q Because we didn't prove capital murder, did we?

A According to the law, you didn't prove it.

Q What did we prove?

A The murder and that was all.

Q Let's imagine for a moment if that were to happen.

Let's say you're on that **[756]** jury and you've just found someone guilty of murder, okay, because that's what we proved. You can forget all about automatic life and automatic death in a regular murder case. Do you understand that?

A Yes.

Q The range of penalty—the law gives you a very broad range of penalty—the judge talked about this the other day—for the offense of murder. It's no longer life or death. It's from five years to ninety-nine years or life. All the law expects you to do to be qualified as juror is this, basically, is to be open-minded, as I believe you are, and be willing to tell us that you will keep an open mind until you would hear the facts of a murder case. Now, you haven't hear any evidence, have you?

A No.

Q And obviously you can't make up your mind until you have heard the evidence, can you?

A No way.

Q And that's all the law expects of you. You can just tell all of us here that you **[757]** have an open mind and you will wait and listen to the evidence and, once all of the evidence is in, you will decide what the proper penalty ought to be based on what you feel is proper and justified and warranted by the evidence and the facts. Can you do that?

A Yes.

Q In other words, if you hear a murder case and you know murder is where one person knowingly or intentionally causes the death of another. That's murder. You've heard the facts of a murder case—and, you know, all murders involve a death, obviously, and they're all going to be bad. Maybe some are just worse than others, okay? The law just says that you be the type of person who would wait and listen to the evidence and, if you hear a case that calls for the minimum—after you've heard the facts, you decide it calls for the minimum punishment, you could give the minimum punishment, if you feel that's the right thing to do and the proper thing to do under the facts as you hear them, okay?

A Yes.

Q Can you do that?

[758] A Yes.

Q If you hear a case, after you've heard all the facts and you follow the law, that you feel calls for the maximum punishment in a murder, would you be able to do that as well?

A Yes.

Q Or obviously anywhere in between, just like you did in that other case?

A Yes.

Q All right. Now, let me just cover one little thing here. The range of penalty, as you know, is from five years to ninety-nine years or life and a $10,000.00 fine. Are you

saying that, if you felt, after you heard the facts of a murder case—you know, some murder case, if you felt that the minimum was the proper thing, could you give as low as five years in the Texas Department of Corrections as the law allows for murder?

A From the facts that were presented, yes, I could.

Q If you felt it was the right thing to do, the proper thing to do, and the just thing to do, after you heard the facts, if you **[759]** said, this is a case—I never thought I'd see one, but this is it—where the minimum is five years, I'll give five years because that's the law?

A Yes, I could.

Q All right, The same thing would hold true for the maximum. If you say, well, this is about as bad as you can get and I believe these facts are horrible and I think he should get the maximum, if the maximum is ninety-nine years or life and a $10,000.00 fine, you could do that, as well?

A I sure could.

Q Obviously, what you're saying is, you would wait and listen to the facts and you and the other jurors would tailor the punishment to fit the crime. Can you do that?

A Yes.

Q Any question about that at all?

A No.

Q Now, just one or two other things here and then these other lawyers will have a chance to talk to you, as well. I think the Judge covered this, but I'm not sure. The law allows that a person can be convicted of murder

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[829] proceedings were held.)

MR. NELSON: We would like the record to reflect that Mr. Gitchaway was a black male excused by agreement.

MR. WEST: Your Honor, I think that the record should reflect that I concur with Mr. Nelson,. the attorney for the

State, that the record should reflect that, that Mr. Gitchaway is a black male.

THE COURT: Ask Ms. Allen to come in, please. Ms. Allen, how are you doing?

MS. ALLEN: Okay.

THE COURT: First of all, let me explain or, apologize to you. We got you here at 1:00 o'clock and we didn't get you in here—into the courtroom until about 2:30. We don't know how long it's going to take to talk to an individual when we start out, so I asked all of you

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[837] THE COURT: Pursuant to my procedure last week, I'll first ask the State if they wish a shuffle?

MR. NELSON: Yes.

MR. WEST: Could we ask the reason for the shuffle?

MR. NELSON: No.

MR. WEST: For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

THE COURT: I'll grand the State's motion to shuffle. I'll ask someone on behalf of the State and the Defendant to go down and do that as quickly as possible. I'll recess the jury and explain

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[922] VIRGINIA R. SMITH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q My name, as I was introduced to you yesterday, is Jim Nelson. I'm going to be talking with you this morning. The first thing I want to do is reintroduce all the people here. To my immediate right is Paul Macaluso. Another gentleman, who isn't here, who is home, I find out now, with the chicken pox as a matter of fact, is Mr. Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned to handle this case for the State of Texas. To my immediate left is Mr. Royce West.

MR. WEST: Good morning.

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[1005] Mr. West. The lady—she's been in the witness box for about an hour and a half with some time out when she was out in the hall, I'm going to sustain the State's challenge to this juror for cause. I'm going to note for the record that I think she was questioned very thoroughly. The Court finds that she—her basic problem, as I interpret it, was that she would just simply be unable either to take the oath initially because of her feelings about the death penalty, knowing the result of her verdict would be the imposition of the death penalty by the Court, or if she were sworn for some reason or another, then her ability would be seriously impaired or affected by her deep-seated feelings about the death penalty. Her demeanor on the stand, as you've noted; she did tend to vacillate to some extent. She appeared to be

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[1012] JAMES D. HOLTZ,

called as a Jury panel member, having been duly sworn by the Court to testify to the truth, a whole truth and nothing but the truth; was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Holtz.

A Good morning.

Q Let me begin by reintroducing most everyone who is here. I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial beings, another gentleman will be with us and his name is Norman Kinne. Believe it or not, Mr. Kinne is about fifty years old and he has the chicken pox. He's the lawyer, as the Judge said, who is actually going to be presenting the evidence on behalf of the State once the trial begins. We are assistant criminal district attorneys who work for Henry Wade and we've been designated to represent the State, okay?

A Okay.

Q Now, you can see Mr. E. Brice

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[1016] will have to make some tough decisions on this case. We just want to know if the people that we talk to are qualified and suited to this type of case. If they're not, obviously now is the time to let us know. If you have a question, Jim, about anything at any time, ask it.

A Okay.

Q If there is something you want to tell us, tell us, all right?

A Okay.

Q Like I said, bear in mind that no one is going to argue you in or out of a position. Just let us know how you feel.

A Okay.

Q Now, I want to let you know how we feel based on the evidence. We're actively seeking the death penalty, Jim, in this case. We make no bones about it. I'm going to tell you up front as we've told all the other—you're number twenty—what we've let all the other jurors know at this

point, what our position is based on the evidence and that's this: we are actively seeking the death penalty in this case for Thomas Joe Miller-El. **[1017]** I'm not apologizing for it. I don't feel that we have to. We intend to be able to provide a jury in this case with the type and the qualify of evidence in the first part of the trial which would convince them beyond any reasonable doubt whatsoever that Mr. Miller-El is guilty exactly as he has been indicted and charged with the offense of capital murder. All right.

In the second part of the trial, we once again intend to be able to provide the jury, you if you're on it, with the type and the qualify of evidence that would convince a jury beyond any reasonable doubt whatsoever that those three or possibly two questions, whatever, should all be answered yes which, as the Judge explained yesterday, results mandatorially, automatically, in the Judge assessing death. That's all he can receive, either death or life, depending upon the answers to the questions. Any question about that at all?

A No, sir.

Q We just feel that it is only fair to let you know what our position is, that we are taking an active role in this case for the **[1018]** death penalty. You understand that ultimately it's up to the jury?

A. Yes.

Q Now, Jim, you've been asked this question, number fifty-six, how you feel about the death penalty and I know they kind of spring it on you, don't they?

A The Judge warned us about it.

Q They give you three lines here and they ask you how you feel about the death penalty. Why don't you share with us, having had an evening also to think about it or to sleep on it, how you personally feel in your own words, number one about the death penalty, and then secondly about your ability to serve or not serve on this type of a case?

A Okay. if I may, I was raised in Rhode island and that's where I spent my childhood and grew up. New England, I'm sure, is noted as a fairly liberal area of the country.

My view are fairly liberal. Icy position on the death penalty is, I believe in the death penalty in the death of a police officer on duty or, you know, an off-duty officer that is acting as a police officer and **[1019]** that's my personal belief. Other than that, I'm opposed to the death penalty. I believe in life in prison.

Q Okay. Like I say —

A I had a lot of time to think about it last night and that's what I did. I thought about that.

Q Let me back up. You know how lawyers are. Sometimes they sound like they're kind of talking you in or out of something all the time. Even if it sounds like that, I want you to understand that we're not trying to do that. I have to ašk you some questions because it really boils down to this, Jim: We must — that goes for everyone here — rely now on what you say in terms of your potential as a juror. We have to rely obviously on what you tell us. People come down here from all walks of life, with all different opinions, and obviously, like you say, we get to talk to individually because we do want your opinion. I'm not trying to sell you on this, okay, Jim, you can do this or, Jim, you can't do that.

A Yeah. I thought about that last night because I knew that question was going to

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[1024] Jim—I'm going to try and go back over some of the things you say. In the process, if I misstate something—

A I'll correct you.

Q Yes, raise your hand and let me know. In all other circumstances, you believe that a life sentence is a proper verdict?

A Yes, sir.

Q Why do you feel that way?

A I've always felt that the penalty was inhumane. I've never really been comfortable with the death penalty. Rhode Island is—the education there is fairly liberal. In

school we spent a lot of the time dealing with social studies and civil court and criminal law and we rehashed that years and years ago and the opinion that I formed at that time was one that I still hold true. There are a number of reasons that I don' believe in the death penalty. I've just never felt that, barring circumstances where police officers are involved, another human's life should be taken. I'm not a believer in the eye for an eye.

Q Okay. I'm going to let you talk as much as you can because every one has heard

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[1031] similar to that of a police officer.

A Serving a summons?

Q Right. A designated chief or police in an incorporated area or being certified as a deputy sheriff or —

A With the exceptions, like you have mentioned, if a police officer is off duty and is in a bar and gets in a fight.

Q Another category of capital murder, as the Judge said, is murder for hire. Let's say I hire Jim to kill Royce.

A I could support the death penalty in that, in a contract killing, as you said.

Q All right. In other words, both of us would be eligible, me for doing the hiring and him for hiring himself out. How do you feel about that?

A That's a tough one. In a murder for hire case, I could believe in the death penalty for the killer and for the person who hired him.

Q Another category would be multiple killings, mass murders. For example, this thing that happened over here —

A Yes.

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[1045] could render an impartial decision.

Q Regardless of whether it's a murder during a robbery, murder during a burglary, murder during a rape or whatever?

A Regardless of that.

Q Let's shift gears here for just a second and let's talk about a situation that I'm not suggesting could occur in this or any other capital murder case, for that matter, but would like to discuss it with you because it is important. Remember that I said one of the types of capital murders is a murder plus like a murder during a robbery or it could be murder during a burglary, as an example. You say you could serve on that type of a case?

A Yes, sir.

Q Now, let's say you're on a hypothetical jury, murder alleged to have been committed during a burglary. Let's say you don't have any doubt whatsoever in the first phase of the trial that the murder was committed, the Defendant is guilty of murder, no question about it, it's obvious, but let's say you didn't hear any testimony about a burglary or you have a reasonable doubt. **[1046]** There's a doubt in your mind whether the murder actually happened during a burglary. Well, you know if you're expected to find someone guilty of capital murder, we have to prove the murder and the burglary. We've only proven the murder; is that right?

A Right.

Q You can't find somebody guilty of capital murder under those circumstances?

A No, sir.

Q You must find them not guilty of capital murder and find there guilty instead of what the State did prove, which is what?

A Manslaughter?

Q No, murder, just regular murder. Murder is a situation—and I want you to bear this in mind—where one person knowingly and/or intentionally causes the death of another individual and that's done without any legal excuse or

any legal justification. Now, I want to harp on that for just a second because I want to make sure that—you said manslaughter there and we'll talk about that in just a second. You've convicted someone of murder and we're not talking about mandatory **[1047]** death or mandatory life. There's a different range of penalty altogether.

A Right.

Q But I want you to understand what murder is and what murder is not. For example, I said where one person knowingly or intentionally or both causes the death of another individual without any legal excuse or legal justification. Let me give you some examples of what we're not talking about when we're thinking about murder and the range of penalty. For example, if I killed Mr. Nelson over here because I believe he is going to kill me or inflict serious bodily injury on me, I could be charged with his murder, but if you were on that jury, Jim, and you believe that I acted in self-defense or if I were on the jury and I believed that you acted in self-defense, I would find you not guilty of murder just like you would have to find me not guilty of murder because that is a legal excuse, self-defense.

A Right.

Q So when you think about the range of penalty for murder, don't be thinking about self-defense because you don't say, well, **[1048]** that's mitigated. It's not mitigated. It's a defense. Do you see what I'm getting at?

A Yes, sir.

Q The same thing would hold true if you believed I killed Jim by accident. Let's say the circumstances look like murder, but if you believe or have a reasonable doubt, if you're on the jury, that it was an accident, not guilty.

A Right.

Q Not mitigation, not a lower penalty, not guilty. Don't be thinking about that. The same thing would hold true of what you said about insanity. You don't lower the sentence for somebody because you think they're insane or maybe were insane. If you believe beyond a reasonable

doubt or have a reasonable doubt about it that someone committed a homicide that would otherwise be a murder, believed they were insane, not guilty. Any problem with that?

A No, sir.

Q One last category and here's a situation that you mentioned earlier, manslaughter. Let's say you believed the **[1049]** situation where someone killed somebody and it would ordinarily be murder but-they acted under the influence of sudden passion from an adequate cause. For example, a father comes home and finds out that his young child had been sexually molested by a neighbor up the street who is up there laughing about it. He's overwhelmed by what he sees and he flies off the handle, picks up a gun or a pitchfork and runs up the street and kills his neighbor. If you believe that he acted under the sudden influence of passion from an adequate cause and you know that might be an adequate cause because he was so enraged, that's not murder. That's what we call voluntary manslaughter. It's a different range of penalty altogether.

Now, excluding all those things, we do not mitigate the offense. Remember we're talking about a situation where one person knowingly and/or intentionally causes the death of another. There's no legal excuse, no justification under the law. What do you personally feel should be the minimum number of years a person should be required to serve for that sort of offense?

[1050] A Well, that's tough. You know, I don't know what the range of penalties are, but my personal belief is life in prison.

Q Like I said, no one is going to talk you in or out of a position.

A Now, that is my personal belief. I don't see any number of years.

Q Okay. Now, let me ask you this: Bearing in mind what we talked about—and I'm running out of time and I'm not going to be able to go over all these categories with you.

Jim, knowing yourself and in all honesty, being as honest with us as you've been to this point, the law allows a different range of penalty altogether. The law says that the range of penalty is as broad as it can be for any offense, for murder. We want to know how you feel. Do you see?

A Okay.

Q Do you feel you could ever hear facts and circumstances where you feel it would be proper, where one person knowingly and/or intentionally—he knew and intended to kill that individual, absent of those other qualifications, those four that I gave you, **[1051]** would you ever under any circumstances, could any proof ever satisfy you that it would be proper that a person should receive as low as five years in the penitentiary for murder.?

A No, sir, no.

Q You feel very strongly about that, don't you?

A Yes, I do.

Q You said it should be life; is that right?

A Yes, sir.

Q Now, the law does allow you in a murder case to consider—you know; to take into consideration the facts and circumstances, but eliminating those four categories, I gather from what you're saying, five years for a human life under those circumstances would never be proper?

A No, sir.

Q Under any stretch of the imagination?

A No. It would be inadequate in my beliefs.

Q If I ever tried to talc you into that, I would be beating my head against a **[1052]** wall.

A You would be talking to a stone wall.

Q I would be talking to a stone wall because that's the way you feel about it?

A Yes.

Q Like I said, I don't have the right to quarrel with you or dicker with you about your personal feelings, Jim, or

anything else for that matter. That's not our responsibility. Are you saying then, if you were on a murder case, there would be simply no way you could assess a penalty as low as five years regardless of the facts and circumstances in a murder case, knowingly and intentionally causing the death of another individual?

A No.

Q You could give life?

A Yes.

Q But nothing—

A Nothing, along the line of five years. If the person was eighty years old, you could drop a sentence to forty years or something, but essentially life.

Q Jim, you've been very polite and

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[1063] Your Honor.

THE COURT: I have a call in for juror number four. I told her to come at 1:45 and since we still have to talk to the next juror—anything else, Mr. Macaluso? All the voir dire is finished; but—

MR. MACALUSO: I just want to ask Jim if he feels bad about what happened two weeks ago in New Orleans?

MR. HOLTZ: The New England Patriots? I had to cook a lobster. Dinner for some friends of mine.

THE COURT: What says the State?

MR. MACALUSO: The State will exercise a Preemptory challenge.

THE COURT: Mr. Holtz, you will e excused from service in this case. I want to thank you, first of all, for your patience with us yesterday and again today and more important than that for

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[1070] SANDRA L. JENKINS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Jenkins. As I was introduced to you yesterday, my name is Jim Nelson and sitting next to me, again, is Paul Macaluso. There will be a third lawyer, as I believe the judge told you yesterday, involved in this. He is a gentleman by the name of Norman Kinne. Mr. Kinne, who I guess is around fifty years old, has the chicken pox. Because of that he's not here. He's at home trying to get over that. The three of us represent the State of Texas in this case. We're assistant district attorneys and we've been assigned this case by Henry Wade your elected district attorney.

Sitting immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Jenkins?

* * * *

[1072] McDowell said and that is, we would like you to relax as much as you can with you upon the witness stand and all of us out here looking you.

A All right.

Q As you talk not only to me, but the other lawyers and the Judge will be listening at the same time because the Judge is the one who has to make the final decision on this. I want you to remember one thing and that is, there is no right or wrong answer to anything anybody is going to ask you. Your answers are not going to show you to be a good citizen or a bad citizen or a good person or a bad person. We're just trying to find out about you because the bottom line is, we want twelve people over here who can serve on this type of case. It takes, I think everybody would agree, a special kind of person to serve on this particular case because what we're dealing with is capital murder.

Capital murder has only two possible punishments, either a sentence of life or a sentence of death and that's it. I want you to understand, as we're going into this **[1073]** thing, Ms. Jenkins, what our position is. We, representing the State of Texas, have been and will continue to actively seek the death penalty for that man down there, Thomas Joe Miller-El. We feel like we will be able to present to you the type and quantity evidence for you to convict him, if you're chosen as a juror, of the crime of capital murder and, once he is convicted of capital murder, answer those three questions on the board yes resulting in the death sentence for Thomas Joe Miller-El.

So that's where we are. That's our position and that's we anticipate asking the jury to do once all of the evidence is in. Now, you, yesterday, filled out a fairly lengthy questionnaire and one of the questions on there, number fifty-six, asked about your feeling on the death penalty. I know that this was something you probably weren't prepared for and didn't have a whole lot of time to think about it before you answered the question, so I'm going to ask you again, if you would, to just put in your own words your feelings about the death penalty.

[1074] A I feel that, if it would be proven beyond a reasonable doubt that the death penalty is warranted, that's what sentence should be given. I think I went on to further explain that I think a harsher treatment is life imprisonment with no parole.

Q Okay. Now, I would guess from what you're telling me then, you feel like the death penalty serves a purpose in our society; is that right?

A Yes, very definitely.

Q What type of purpose? What pops into your mind as the purpose of the death penalty?

A The purpose of the death penalty—well, there could be several purposes. It can act as a deterrent. It obviously, from a taxpayer's standpoint, instead of sentencing someone

to life in prison, it's a little less expensive, but really that is not the point even here or there. I'm a little nervous here.

Q I understand. I know it's tough to relax sitting up there and going through these things, but—

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[1094] A I'm still with you.

Q Okay. Now, one thing that we don't expect to happen and we don't anticipate happening in this case, but may happen, is that we don't prove capital murder. Let's say, for example, that we have a case where we've alleged murder in the course of a burglary and we prove to you that the Defendant knowingly or intentionally caused the death of another but we don't prove anything about a burglary, nothing at all. Therefore, we don't have capital murder, do we?

A No, we don't.

Q We just have murder?

A Correct.

Q Okay. The range of punishment for murder, just regular murder, does not include the death penalty in the State of Texas. The range of punishment for the offense of murder is anywhere from five years up to ninety-nine years or life in the Texas Department of Corrections, a sentence of five years up to ninety-nine years or life. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire **[1095]** range of punishment if the person is convicted of murder. When I talk about-murder, I'm not talking about self-defense or accident or insanity because, if any of those are the case, then the person is not guilty, okay?

A Okay.

Q If the killing is done in the heat of passion—for example, one incident I've heard talked about would be where a father came home and his four year old daughter had been raped and the neighbor did it. He was standing down the street laughing about it. He goes and gets his deer rifle and

goes down there and shoots his neighbor because he's so enraged by what happened. That's a killing in the heat of passion, but that's voluntary manslaughter. It's not murder. Murder is the knowingly or intentionally causing the death of another individual without any legal justification whatsoever, okay? You have to be able to consider for that type of offense the entire range of punishment.

Now, when I say "able to consider", I don't mean that you have to be able to tell us right now you will give five **[1096]** years or be able to tell us right now that you will give life because you haven't heard any of the facts. You don't know what the facts are .at this point and we can't tell you. Now, would you agree with me that there is a myriad of circumstances in which one person could knowingly or intentionally kill another person?

A Definitely.

Q You could sit here for hours and not think of all the different things that could-be involved in something like that; is that right?

A That's correct.

Q Okay. If you were sitting on a jury and you convicted a person of murder, not capital murder but murder, and after hearing all of the evidence and all the facts and circumstances, if you felt that a life sentence was justified by the facts and circumstances, could you give a life sentence for murder?

A Yes, I could.

Q If after hearing all the facts and circumstances, whatever they may be, whatever may go into this offense of murder, if you believed from listening to all that, hearing **[1097]** all the evidence you're going to hear, that a five year sentence is called for and justified, would you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and even think of what would constitute a five year sentence or what would justify a five year sentence. All

you have to be able to tell us is, if you saw that case, whatever it is, if it calls for a five year sentence, you could give a five year sentence and I believe you're telling me you could do that; is that right?

A That is correct.

Q So you can consider that entire range of punishment, anywhere from five years up to ninety-nine years or life—and there is also an optional fine of up to $10, 000.00 on the end of it. Are you telling me that you could consider that entire range of punishment?

A Yes. As I stated, I think punishment should measure up with the crime.

Q Right, and you're going to keep an open mind and listen to all of the evidence, all the facts of the case and everything else **[1098]** that's brought to you before you make a decision; is that right?

A Definitely.

Q And that's the same thing you're going to do even if he's convicted of capital murder, listen to all the facts and circumstances and all the evidence before you make your decision; is that right?

A Yes, definitely.

Q And that's all we're asking you to do, not to make up your mind right now, but to keep an open mind and listen to everything and then make a decision. Okay?

A All right.

Q Let me touch on a couple of other things just real quickly. Number one, the Judge talked to you about one eyewitness. He said that the law allows us to prove a case in the State of Texas based on the testimony only one eyewitness if you—

MR. WEST: Excuse me, Mr. Nelson. Your Honor—

THE COURT: I don't believe that is one of our jurors, but you might check, Bob. You're not a

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[1127] A As long as the facts were appropriate and I, my own mind, believed that was the justification for the minimum sentence, yes.

MR. WEST: I'll pass, Your Honor.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: Your Honor, we would be very happy to have Ms. Jenkins serve as a juror in this case.

MR. WEST: We will be very happy to excuse her, Your Honor.

THE COURT: Thank you; Mr. West and Mr. Nelson. Ms. Jenkins, you've been excused from service in this case which means you can leave here and go about your business. You don't have to stay around any longer. If you will give your badge to the bailiff, we would appreciate it, as you leave.

Off the record, Pam.

(Whereupon, there was an

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[1130] COLLEEN MOSES,

called as a Jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Moses. How are you doing?

A Fine, and you?

Q I'm doing better than I was yesterday. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson. You were not introduced to Norman Kinne. He's the third assistant district attorney assigned to this case. He's not here today and he wasn't here yesterday and he won't be here for three weeks because he has the chicken pox.

A Oh, great.

Q Right, and he's about fifty years old. We work for Henry Wade and we are assistant district attorneys and Mr. Wade has designated us as the lawyers to represent the State in this case. Now, the gentleman to my

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[1134] right questions and you just tell us what is on your mind, you will be doing the right thing and so will we, okay?

A Okay.

Q No one is going to play lawyer with you. That comes from a lawyer, by the way, saying that to you. We're not going to try to talk you into anything or out of anything. If there is something you want to tell us; by all means tell us, whether we touch on on it or not, if there is some question you have at any time about anything we talk about, this is the time to ask it. Don't be bashful. I don't think you will be, but relax and just—and if I don't make myself clear—I tend to really start talking fast at times, so if you don't understand me, just tell me to slow down and I'll be happy to do that.

A I'll raise my hand.

Q All right. That's a deal. Now, let me tell you where we stand in this case so we're just as straight forward with you as we've been with the twenty-one other people we've talked to at this point. The State of Texas, Ms. Moses, in this case is actively [1135] seeking the death penalty for Thomas Joe Miller-El, that man right down there. We make no bones about it and we make no apologies for that. The law allows it and we intend to be able to provide a jury, once the trial begins, with both the type and the quality of evidence that would convince a jury—and that would be you; if you're on this jury—that Mr. Miller-El is guilty of capital murder just as he has been indicted by the Grand Jury beyond any reasonable doubt whatsoever. That's done in the first part of the trial.

The second part of the trial, where the punishment is determined, once again we intend to be able to provide the

jury with the type as well as the quality of evidence that mould convince them beyond any reasonable doubt whatsoever that all the questions the Judge, referred to, the two or three questions you would be asked in that phase, should be answered yes. The result of all affirmative or yes answers is that the Judge must sentence Mr. Miller-El to be executed. Do you see what I'm getting at?

A Uh-huh.

[1136] Q Just the same; if there is one or more no answers, the judge must assess a mandatory sentence of life. He has no latitude. The reason I mentioned it is just to put you on notice as to exactly what our position is and what we intend and hope to be able to prove through the evidence once the trial begins and basically, I guess you could say, what the stakes are in this particular case. All right?

A Okay.

Q You understand that ultimately it doesn't matter what the lawyers think, it's what the jury thinks and the decision will be made ultimately by the jury, okay?

A Yes.

Q Now, Ms. Moses, you were asked this question and you knew you were going to be asked it again, I suppose, and that's question number fifty-six and that concerns your feelings about the death penalty. I know you weren't given very much time to think about that before you answered it, but you've been able to sleep on it overnight, haven't you?

A Uh-huh.

[1137] Q Let me ask you, would you share with us, ma'am, in your own words, first your personal feelings about the death penalty and capital punishment generally and then secondly, your ability or your inability to actually serve in a case of this type as a juror?

A Well, I believe in the death penalty, but I think that it would be—whatever decision that I came to at that time, I can't say right off the bat that I think someone should get the death penalty without knowing the circumstances and all the other things.

Q Well, no one will quarrel with you about that at all. In fact, the law—of whether a criminal offense involves the death penalty or it involves a $200.00 fine, the same things would hold true and that is, you must presume any Defendant to be innocent before you hear any evidence at all. Do you understand that?

A That's true.

Q That's the same thing for Mr. Miller-El. It doesn't matter how bad an indictment may sound or how serious a level of

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[1164] Q All right. That's what the law expects of you. Okay. Let's shift gears for just—I didn't forget the third question. That will only come to you if it is raised by the evidence. That just basically asks you if it is a provoked killing or an unprovoked killing. If you decide it is an unprovoked killing, you answer the question yes. If you decide it was a provoked killing, that the deceased did something or said something to provoke the killer, you decide whether the killer acted reasonably or unreasonably. You see, you can answer that question yes or no depending upon the evidence.

A Okay.

Q Let's shift gears—and the Judge is being very patient with me and I need to hurry up here. I want to talk to you about a situation that we're not suggesting would occur in any case, ma'am, but we need to cover it with you. Let's say you're on another capital murder jury. Let's say it's a murder that allegedly occurred during a burglary. That's another type of capital murder. Do you see what I'm getting at?

[1165] A Uh-huh.

Q Now, let's say you don't have any doubt after you heard the first part of the trial that the Defendant committed the murder; but let's say you didn't hear any evidence about a burglary or you had a reasonable doubt about the burglary. If that were the case, Ms. Moses, you understand

that, where the State did not prove both parts of the offense—we have to prove both the murder and the burglary if we expect you to convict him of capital murder—the law says you couldn't convict someone of capital murder if you didn't hear anything about a burglary. Do you see what I'm getting at?

A Uh-huh.

Q In which case you find the Defendant not guilty of capital murder because we didn't prove that, did we?

A No, sir.

Q Instead you find him guilty of what we proved, which is what, murder. Now, if that were to happen and let's say that you found someone guilty of regular murder, then it's no longer automatic life or automatic **[1166]** death. Instead, it's a range of penalty, just like the Judge said the other day, five years to ninety-nine years or life and an optional $10,000.00 fine. That sentence, the number of years, depends entirely on the facts and the circumstances of the murder case. You know as well as I do that there could be an infinite number of situations where one person can murder another. They're all bad, but some are worse than others and the law allows you this latitude to say basically this: That you have an open mind, and I know you do; you will wait until you hear the facts of a murder case and then and only then, once you've heard all the facts, you will decide what the proper penalty should be. Like you may have said earlier or someone said, it's the old cliché about you make the punishment fit the crime. All right?

A Uh-huh.

Q The law wants you to keep an open mind and you tell us that you have an open mind and that you will consider the full range of penalty and assess the penalty somewhere within five years to ninety-nine year or life for murder after you've heard the facts of the **[1167]** case. Could you do that?

A Yes, sir.

Q In other words, if you hear a case to your way of thinking is proper and it warrants and justifies and calls for

a sentence of five years—because that's the minimum—you will give five years for murder. Can you do that?

A Yes, sir.

Q Assuming you heard facts and circumstances that tell you it's the proper thing to do. By the same token, if you hear facts or a situation that you think calls for ninety-nine years to life and you think that is the proper thing to do, once you've heard the evidence—and you haven't heard any evidence yet, have you?

A No, sir.

Q Could you give a verdict of ninety-nine years or life for murder and an optional $10,000.00 fine if you thought that was proper?

A Yes, sir, I could.

Q Or anywhere in between?

A Right.

[1168] Q Any problem with that at all?

A No, sir.

Q I'm out of time, Ms. Moses, but let me just ask you before I let the other lawyers talk to you, do you have any reason whatsoever, whether I've covered it or not, why you couldn't be fair to both sides in this particular case?

A No, sir, I do not know of any reason.

Q Any reason whatsoever why you couldn't give Mr. Miller-El a fair trial here and make the State proves its case beyond a reasonable doubt? Will you make us do that, ma'am?

A Yes, sir, I would.

Q You would keep that open mind?

A Yes, sir, I would.

Q I think you will, too, Ms. Moses. You've been very polite and kind to me.

MR. MACALUSO: I'll pass the prospective juror.

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[1207] PENNY M. CROWSON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Crowson, as I was introduced yesterday, my name is Jim Nelson and I'm an assistant district attorney here in Dallas County. The man next to me is Paul Macaluso. Another gentleman who will be involved in this trial, if and when he gets over the chicken pox, which he has, is Norman Kinne. Mr. Kinne is another chief felony prosecutor with our office. The three of us are employed by Mr. Wade and have been assigned to this case to handle it for the State of Texas.

Directly to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Hi. How are you this afternoon?

MS. CROWSON: Fine, thank you.

Q Sitting next to him is Mr. Royce [1208] West.

MR. WEST: How are you doing, Ms. Crowson?

Q These two gentlemen have been appointed by Judge McDowell to represent the Defendant who is seated at the far end of the table in the light blue suit, Thomas Joe Miller-El. Mr. Miller-El is indicted, as the Judge has told you, for the offense of capital murder, the most serious offense you can be charged with in the State of Texas.

What we're going to do for the next few minutes is try to find out as much about you as we can and about your feelings with reference to the death penalty and some other things. In order to do that, I'm going to be talking to you and asking you some questions. What I would like you to do is just relax as much as you can sitting up on the witness stand with all of us looking at you. I think maybe it's a little easier this way than the normal—have you been on a jury before?

A No, sir.

Q In a normal case, you would sit as you did yesterday morning with the group out [1209] here and be asked the

questions and discuss things out there in front of forty or fifty other people. Our hope is, by doing it this way, because there are some very strong feelings one way or the other and some very difficult issues involved, that you will feel a little bit more comfortable in answering the questions we have for you.

There are no right or wrong; answers to anything I may ask or the lawyers ask you or the Judge asks. We're just trying to find out what you think and how you feel about certain things. If you will be honest with us and answer the questions as openly and as forthrightly as you can, that's all we ask of you. Okay?

A Okay. I'll do my best.

Q As I told you this Defendant is charged with the offense of capital murder. I think it is only fair to you that you know going in what our position is. Our position is we have been and will continue to actively seek the death penalty for Thomas Joe Miller-El, the man at the far end of the table down there. We feel like we will be able to present to the [1210] twelve persons on this jury the type and quality of evidence sufficient, number one, to convince you that he is guilty of the offense of capital murder. Then when we move to the punishment phase to convince you that each of those questions there should be answered yes.

When each of those is answered yes, the result is the Judge assesses the death penalty. We're talk about those a little more in a few minutes. You had a chance yesterday to fill out this questionnaire and one of the questions related to your feelings about the death penalty. I would guess that it was kind of sprung on you without warning. You didn't know what you were coming in here for really and you didn't have much chance to think about it. Now, that you've had time to sleep in it a little bit, would you tell us again in your own. words how you feel about the death penalty?

A I feel that—you want to know what my decision would be or what the crime would have to be before I would go with that or—

Q That's part of it. But number one basically, you said you were in favor of **[1211]** the death penalty or you believe in the death penalty?

A I believe that it depends on how serious the crime is and it would also depend on whether the Defendant could be rehabilitated. It would depend on—the punishment that I would go with would depend on what their past record was and whether I thought there was a chance to be rehabilitated. If I thought there was a chance that the Defendant could be rehabilitated, I would probably not go with the death penalty.

Q Okay. That's fair. But you do feel, from what you say, that under certain circumstances the death penalty is warranted and it serves a purpose then; is that right?

A Yes.

Q What you're telling us is, there are some people that cannot be rehabilitated. By looking at their past acts and what they've done, you could tell if they could not be rehabilitated; is that right?

A Well, for instance if they committed a murder and were paroled from prison and then went out and did it again, I wouldn't

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[1221] you paraphrase that? Does that mean he did not do it under the heat of passion? Are those the words that you used before?

Q No. That's something different. That asks if the deceased, the person killed, provoked the killing in any way. Did he do something to provoke his own killing. If he didn't, you have to answer that question yes because the killing was unreasonable. If he did, you would have to make a decision whether the killing was reasonable in response to any provocation.

You've said that you believe in the death penalty under certain circumstances. How long have you felt that way?

A Probably—I don't consider myself being that old—probably not since college. I probably didn't make up my mind. I'm not one hundred percent certain that my mind is made up at this moment, but I would say that I pretty much—maybe since I was twenty-one or twenty-two.

Q Okay. So five or six years, something like that?

A Uh-huh.

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[1224] for?

A They're asking whatever the Defendant did, he did it knowing full well when he did it that it was going to kill the person that he was aiming the gun at.

Q For example, if I was standing here and I pointed a gun at Mr. Macaluso's head and pulled the trigger, it would be pretty deliberate that I was planning to kill him when I did that, but if I shot at his foot and somehow it bounced off the floor and off the wall and came back and killed him, then that might not be something deliberate?

A Uh-huh.

Q That's a pretty wild example, but I think that's basically what we're talking about. Number two is a little bit more involved. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do you think that question is asking?

A Whether there's a chance that the Defendant could be rehabilitated.

Q When you say "rehabilitated", what **[1225]** do you mean?

A Well, that there would be a chance that this person would get out of prison and intermingle with society again, that there would be a chance that he could do that successfully without committing the same or other serious crimes again.

Q Okay. I think from what you're saying, probability to you means a chance; is that right?

A Well, a pretty strong chance. Probability meaning pretty much beyond doubt.

Q What is beyond — that he would not commit an offense beyond a doubt or he would commit another offense beyond a doubt?

A Let's see. This is asking whether you believe that he would probably commit the same crime again if he had the same chance.

A Okay. Now, it doesn't necessarily say he would commit another murder. It says criminal acts of violence. Do you see a distinction there?

A Yes.

Q For example, would you agree with me that rape might be a criminal act of **[1226]** violence?

A Yes.

Q Or a robbery?

A Yes.

Q Or an assault of some kind?

A Yes.

Q For example, even if I took a baseball bat and hit Mr. Macaluso up side of the head with the baseball bat, would you agree with me that's a criminal act of violence?

A Yes, if you did it on purpose.

Q Okay. You're saying that we would have to prove to you that it would be almost certain that he would do something like that again?

A Well, before I had to answer these questions would I know what the Defendant's past history has been or would I have no indication as to that?

Q Let me talk about that just a little bit. You may hear about past history. You may also hear just about the offense, what he did before the offense, what he did during the offense and what he did after the offense.

[1227] For example, you might be able to know before the offense whether he was involved in planning the offense or not. Did he plan it or was he just a bystander? Was it a spur of the moment thing? During the offense, what role did he play? Was he a leader or was he on the fringes as a lookout kind of thing? Was he giving orders or was he following orders? Was he involved or was he not really involved? Could he have done something short of what he did? In other words, did he have to commit whatever violent act he committed or could he have done something less? After the offense, was he remorseful? Did he feel bad about it? Was he sorry for what he had done or was it just like slapping a fly, just another day at the office, no big thing to him? You can hear things like that. Would you agree with me that you might be able to make a decision on question number two from knowing things like that?

A Yes.

Q Okay. You would also like to hear, if you could, about past history?

A Yes, past criminal record. Is that what you're talking about?

[1228] Q Right.

A That's what I'm talking about.

Q That's what we want to know, is what you're talking about. Any any other criminal acts after the offense took place, also, all those things would be a help to you; is that right?

A Yes.

Q Do you feel like you could use that type of evidence to answer question number two?

A Yes.

Q You hesitated?

A Well, probably because I know I'm not supposed to, but I couldn't help but let those things affect my opinion.

Q Why do you think you're not supposed to?

A I don't know. I would just assume that you would go just strictly by the evidence and not —

Q Anything you hear; if you're sitting on the jury, anything and everything you hear will be evidence except what they lawyers say. What I say now and what the Judge **[1229]** says and what anyone says during the trial is not evidence. You will be able to consider anything that comes from the witness stand. That may be the facts of the case before the offense, after the offense, prior record, if he has any, other criminal acts, if there is any evidence of that. You can hear all of that and you can consider all of that to make a decision on question number two. Okay?

A Okay.

Q. Is there one of those that you feel would be more important than the others in answering question number two, one type of evidence that would be more important than the others?

A I don't know. I would have to think about it. I would have to have more examples. You talked about whether he was the leader or the follower or whether he could have — there was something lesser that he could have done. Something like that would definitely be an important part.

Q Okay. Now, you understand that question number two says nothing about rehabilitation?

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[1252] lawyers here at the side for a second.

(Whereupon; there was an off-the-record discussion between counsel and the Court, after which the following proceedings were held.)

MR. NELSON: Your Honor, the State will exercise one of its challenges.

THE COURT: Thank you, Mr. Nelson. Ms. Crowson, you will be excused from service in this case which means you may leave here and go about your business and give

your badge to the plaintiff. I want to thank you for your service and your patience with us. It's been along day and we're still working and we're going to be working for a while longer. I appreciate your patience with us. Thank you.

Ms. Smale, I won't take but a second to say what I want to

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[1255] GWENDOLYN M. SMALE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good late afternoon, Ms. Smale. We're all getting a little bit punchy here.

A That's why I wondered if every one is going to look alike.

Q I will get right to the heart of the matter by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne who, you being a doctor's wife can appreciate the fact that Mr. Kinne is about fifty years old and has the chicken pox.

A I had them at thirty, so I can sympathize with him.

Q He's going to be out for about two or three weeks, so this jury selection better take at least that long.

To Jim's immediate left, ma'am, is Mr. E. Brice Cunningham.

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[1258] questions, we'll be doing our job and you will be doing yours. No one is going to try and talk you into anything or out of anything. Just let us know how you feel.

If there is something that we don't touch on that you feel is important, you tell us. If you have a question about anything, by all means ask it and we'll do our best to answer it.

Let me tell you what our position is based on the evidence. The State of Texas is actively seeking the death penalty in this case for this Defendant. We make no bones about it. The law allows for it. There is no question about that. We intend to be able to provide a jury, once it's selected, and it could mean you, with both the type and qualify of evidence that would convince them beyond any reasonable doubt that the Defendant is guilty .of capital murder exactly as set out in this indictment. That's done in the first part of the trial.

Then again in the second part of The trial, we intend to provide a jury with the type and quality of evidence that would **[1259]** convince them beyond any reasonable doubt that all the questions should be answered yes which, as you know from what the Judge said yesterday, would require the Judge to assess a sentence of death for Mr. Miller-El. That's the reality of this situation. Although we've been kind or cutting up here a little bit, bringing it back to home as to where we are and what this is all about, it's simply that. We intend to be able to provide—

THE COURT: Ms . Smale, let me ask you, if you would, ma'am, to step down and go in the jury room for a second and let me take care of a law matter and we'll get you right back on the witness stand.

(Whereupon, Ms. Smale left the courtroom, after which the following proceedings were held.)

THE COURT: The Defendant needed some medicine.

(Whereupon, Ms. Smale returned to the courtroom **[1260]** and the following proceedings were held.

THE COURT: Go ahead, Mr. Macaluso.

Q Back to what I was saying, the reality of the situation is—I don't need to tell you that it is a very serious situation that requires certainly the utmost concern of every one who would be a prospective juror in this type of case.

Strong feelings, of course, enter into this type of situation, to a large degree the penalties and the nature of the offense. You were asked this question, number fifty-six, how you feel about the death penalty and Lord knows you were given precious little time to really reflect on that. You've had overnight, so let me just ask you if you would share with us—because we're all interested, of course. Could you share with us in your own words how you feel about the death penalty and capital punishment basically and generally speaking and then your ability to actually serve on this type of jury or your inability to serve, if you feel you cannot?

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[1282] will only receive the first two questions in which case you answer those. Two yes answers it's death mandatorially. That question basically asked you whether or not when he killed him was he provoked to kill him. If you find that there was no provocation, of course, you answer the question yes. If you find that there was something that the victim did or said to provoke someone into killing him, even though it's not a defense, you decide whether it was reasonable or unreasonable for the Defendant to kill this individual. If you find that it was unreasonable, you answer the question yes. If you find that it was reasonable, you answer it no. That's a confusing sort of question; isn't it?

A Well, the way it is stated, but I assume what you're saying is, was the killing by the Defendant based on just cause by an act of the deceased.

Q Right. In any case, you can see how these question can be answered yes or no depending on the evidence?

A Right.

Q Let's shift our gears for just a **[1283]** second and go back to something we talked about earlier and that's a situation where you would be called upon to consider the range of penalty for the offense of murder. Remember that I said regular murder? I'm not suggesting, Ms. Smale, that this would ever occur in this case or any particular case, but it's

something like the other things we've been talking about. We have to discuss it.

Let's say for example, Ms. Smale, you're on a hypothetical jury. It's a capital murder indictment, but it alleged that it is a murder during a burglary which is a type of capital murder, murder plus burglary. Let's say you don't have a single doubt whatsoever nor do the other jurors that the Defendant committee murder. You didn't hear any testimony about any burglary or you have a reasonable doubt about whether it was done during a burglary. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both the murder and the burglary and we didn't do that, did we?

A You said you didn't.

Q Okay. In which case, you couldn't **[1284]** find him guilty of capital murder. You would find him not guilty of capital murder because we didn't prove capital murder. You found him guilty of what we proved which is what? Murder. All that does is change the range of penalty back. It is no longer mandatory life or death. Instead it's that range of penalty we talked about earlier. It's as broad as any range for any offense under the laws of this state. Broad, I think, because the legislature had in mind what we all know and that is, one person can kill another. In other words, commit murder under a myriad, and infinite number, of facts and situations. The law allows a juror, a jury as a whole, to take into consideration all of the important surrounding facts and circumstances in deciding what the proper penalty ought to be. It's kind of like tailoring the punishment to fit the crime. It's a cliché, but it's true. That's what the law expects you to do.

Now, I know you haven't heard any testimony at all on which to base a decision, have you?

A No.

[1285] Q And that's what the law says. The law expects you, to be a qualified juror on a murder case, to number one tell us that you can follow the law in regard to what

the range of penalty is. Secondly, that you will keep a completely open mind and wait until you've heard something on which you can base a decision and that is the facts, right?

A Right.

Q If you hear a fact situation to your way of thinking that calls for and warrants and basically justifies a particular number of years, that's what you will give after you've heard the evidence. Fair enough?

A All right. I think that's what is on the questionnaire.

Q In other words, even though you can't consider—or let's say conjure up in your mind now a fact situation that calls for the maximum or a fact situation that calls for the minimum, you're open-minded. You're open-minded, aren't you?

A Yes.

Q You haven't heard any evidence and you will just tell us that you will wait and **[1286]** listen and if you hear a fact situation that, to your way of thinking, is proper and calls for and justifies the minimum and the minimum is five years you'll give five years if you feel that's what is called for. Can you do that?

A Yes.

Q If you hear a fact situation that calls for the maximum, ninety-nine years or life, and you think that's the proper thing to do, you would actually vote for ninety-nine years or life and even add on the $10,000.00 fine, which is an option. Can you do that?

A Yes.

Q Bear in mind that doesn't mean that you have to sit there and think of a fact situation or you're being committee to anything. All you're saying is, I know what the law is and I'll follow the law whatever that is. I will wait until I hear the facts and I will do what is proper once I've heard the facts.

A That's right.

Q Any proplem with that at all?

A No.

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[1369] RONNIE LONG,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Long. As I was introduced to you on Monday, my name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. There is one more gentleman who will be involved in this trial when we start the evidence and that is a man by the name of Norman Kinne. Mr. Kinne is about fifty years old and he is home with the chicken pox and has been for a few days and probably will continue to be for a few more.

The three of us, Mr. Kinne, Mr. Macaluso and myself, are assistant district attorneys assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good

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[1372] in—I feel like it it only fair that we tell you our position in this case. The State of Texas, meaning Mr. Kinne, Mr. Macaluso and myself, is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic

death penalty from Judge McDowell. We'll talk more about that in a few minutes, but that's our position.

You had a chance on Monday to fill out a questionnaire and one of the questions on there was your feelings about the death penalty. I would guess that was kind of a surprise, that this whole thing was kind of sprung on you on Monday without much warning and you didn't have a whole lot of time to think about your feelings about things. You've had a couple of days now, a couple of nights to sleep on it. Would you tell us again in your [1373] own words how you feel about the death penalty in the State of Texas?

A Do you mean whether I'm for or against it?

Q Are you for or against it and do you feel it serves a purpose in our society?

A I do feel it serve a purpose as a deterrent toward crime.

MR. WEST: I can barely hear you, sir.

A I do feel that it is a deterrent toward criminal activities.

Q Mr. Long, is this something that you had thought about before Monday?

A Yes.

Q Is this a belief that you have held for quite a period of time?

A Yes.

Q Okay. I see you're married; is that right?

A Correct.

Q Would you venture a guess as to how your wife feels about the death penalty?

A I really haven't thought much about that, but I would not think she would be

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[1390] burden of proof on proving the case in the first place; the capital murder offense?

A Right.

Q Okay. Mr. Long; I want to talk to you about one other thing that we don't anticipate will come up in this case, but it is always a possibility. That is—let me take a different situation. Let's assume we have a murder that we have charged, a murder being committed in the course of a burglary. That would be a capital murder charge according to the laws in the State of Texas, right?

A Right.

Q Let's assume that we proved to you that the Defendant knowingly or intentionally caused the death of another individual, but we don't bring you any evidence whatsoever of a burglary. Now: we haven't proved capital murder then at that point, have we?

A No, sir.

Q All we have proved is murder?

A Right.

Q If all we prove is murder, the death penalty is no longer an option in that **[1391]** particular case. The range of punishment changes drastically. The range of punishment for under is any where from five years up to ninety-nine years or life and a fine of up to $10,000.00. That's the widest range of punishment for any offense under Texas laws. Would you agree with me, Mr. Long, that there are just a myriad of circumstances under which a murder can be committed, all kinds of factors that could come into it and be surrounding circumstances in the killing of another human being?

A Yes, sir.

Q Okay. Now, I want you to be clear about one thing. We aren't talking about self-defense, then the person is not guilty of murder. If the jury finds that it is an accident, the person is not guilty of murder. If the jury finds it is a killing under the heat of passion, he's not guilty of murder. He's guilty of voluntary manslaughter. Those are all different. What we're talking about is knowingly or intentionally taking the life of another human being without any legal justification or **[1392]** excuse. Other factors can come in from all over the place. All kinds of other circumstances can enter into it, but no legal justification or excuse. Are you with me so far?

A Yes.

Q In order for you to be qualified to serve as a juror on this case, you have to tell me, Mr. Macaluso, the lawyers for the defense, and the Judge that you can consider the entire range of punishment for the offense of murder. Now, when I say consider; I don't mean you have to be able to tell us right now I'll give five years. You don't have to be able to tell us right now that you would give life because you haven't heard any of the facts in this case and obviously you can't make a decision until you've heard all of the evidence you're going to hear. Would you agree with me on that?

A I do.

Q What we're asking is, if you feel, after haring all the evidence, that the person is guilty of murder, if the facts and circumstances justify it and call for it in **[1393]** your mind, could you assess a ninety-nine year or a life sentence for the offense of murder?

A Yes.

Q Let's go to the other end. If after you've heard all of the evidence and you found the man guilty of knowingly or intentionally causing the death of another individual without any legal excuse or justification—you've now heard all the evidence you're going to hear on the guilt or innocence and on punishment—if you feel, after hearing all of that, that the facts and circumstances justified and called for. In your mind, a five year sentence, could you consider and give a five year sentence for the offense of murder?

A Yes, sir.

Q If the facts and circumstances justified it after you heard all of the evidence; is that right?

A Yes.

0 So all we're asking you to do is keep an open mind as to the entire range of punishment until you've heard all of the evidence. Do you feel like you could do that?

[1394] A Yes, sir.

Q Okay. Now, we don't have to prove to you, Mr. Long, in either phase motive or premeditation. I think the Judge told you that the other day. Those are not issues in a murder case in the State of Texas. You hear about them on TV a lot. I guess maybe they're issues in California, but they aren't here. We don't have to prove why the killing happened, although we may. It's not a burden. We don't have to prove to you a motive. We don't have to prove to you that it was premeditated. Do you have any problem with that?

A No, sir.

Q The law also allows us to prove a case with a single eyewitness. Would you agree with me that there are cases like that, a purse-snatching or a rape, where there may only be the person that did it and the victim of the crime there at the time?

A Yes, sir.

Q That's why the law allows us to prove a case with only one eyewitness. If you believe that eyewitness beyond a reasonable doubt as to each element of the offense, you're

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[1437] LINDA M. BERK,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q. Ms. Berk, let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson and when the trial itself begins, you will be introduced to a gentlemen by the name of Norman Kinne. He's not here because he has, of all things, the chicken pox.

A. Sounds like he teaches first grade.

Q. He's about fifty years old, too, and we're giving him a lot of ribbing. He will actually be presenting the evidence to the jury once the trial itself begin. We are all three assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State.

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[1441] one and you're not there to—if you just tell us exactly and precisely how you feel as honesty as you can tell that's all that that's all any once ask and you'll be doing your job as I said earlier, Now, if you have a question about anything, then by all means ask it. If you have something that you would like to tell us, chime in at anytime because your opinion, really—I'm not trying to patronize you. Your opinion is the most important opinion here right now. They've all heard me speaking for a couple of weeks. They know me. They don't need to hear from me. They need to know how you feel.

Now, let me tell you exactly what our position is, Ms. Berk, with regards to this case. You know that Thomas Joe Miller-El is charged with capital murder. From what you may recall the judge saying on Monday, you know that a person who is convicted of capital murder can receive only on of two possible penalties. One is a sentence of death, which is carried out by the execution of an individual through the injection of a lethal substance. The other sentence is life. There **[1442]** is no in between for a person convicted of capital murder.

I don't mean to be unnecessarily graphic about this, but I think it is only fair that you and any other juror we talk to—to let you know exactly what the stakes are and to acquaint you and familiarize you as much as we can with what really is going on here.

Let me start by saying this: The State of Texas, that is, Mr. Kinne, Mr. Nelson and myself on behalf of Dallas County are actively seeking the death penalty for Thomas Joe Miller-El in this case. We make no bones about it. That's our position based on the law and based on the evidence. We intend to provide a jury in this case, once it is selected, with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever in the first part of the trial that Mr. Miller-El is guilty exactly as he's been indicted of the offense of capital murder.

Then in the second part of the trial, we intend to be able to provide a jury, once it is selected, with the type and qualify **[1443]** of evidence that would convince them beyond any reasonable doubt that the questions that will be submitted to the jury should be answered in each case yes which, as you may recall from what the judge said yesterday, would require the judge then to assess mandatorially a sentence of death by lethal injection. Do you see what I'm getting at?

The reason I say this is, I've read your questionnaire and I've got kind of a handle on how you feel about things. We'll discuss some things in just a minute, but I want you to understand, what I think you already know, clearly and that is, this is not something that you're reading about. It's not something you're discussing over coffee with friends when you're debating over whether it may be. You are in the thick of it, so to speak. Because we have this opportunity now to talk to prospective jurors like yourself, we get to find out whether or not just qualified generally for jury duty, but whether or not they're suited for this type of case.

I know I'm running on here, but **[1444]** we've talked to twenty-six people in this case in preparation for this jury selection and we have two jurors so far and one is kind of iffy because of a medical problem. If you just look at it arithmetically, it's very very small percentage of the people that we talk to that are ultimately both qualified and suited for service on a capital case. I think you know why. You know why, don't you? So what we need to do is see how you feel and see whether or not you're qualified. I'm sure generally

speaking you're probably qualified for most any type of jury service, but you may not be suited for this type of service. Like I said earlier, arithmetically so far, if you go on the basis or the number we've talked to and the number of jurors we have, one in thirteen of you. That doesn't make the twelve other ones who are not going to serve on this jury bad citizens or anything like that. Do you understand that, of course?

A Yes, sir.

Q There's no doubt about that. It just means for one reason or another they simply were not suited or qualified for this **[1445]** type of jury service. That's what we're about here and that's what we need to talk to you about.

Now, I notice on your questionnaire with regard to question number fifty-six where you were asked how you feel about the death penalty. I sense, at least, just from the way you're kind of fidgeting up there, you've got some real strong feeling about this?

A. I came to grips with that yesterday.

Q. Tell us, if you would, in your own words how do you feel about the death penalty and then, secondly, your ability, in all honesty, or inability to actually serve on a of case of this type and actually render a decision that would result in the execution of another citizen?

A You're going to have to excuse me because I'm getting a little emotional, okay?

Q. There's no need—okay.

A. I know, but you see I have never come to grips with this before. I remember especially during the Manson trial—I lived

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[1480] DOMINICK DESINISE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Desinise. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me again is Mr. Paul Macaluso. As the trial moves onto the stage where we actually present evidence another man will be joining us and his name is Norman Kinne. Mr. Kinne, who is about fifty years old, is home with the chicken pox and has been for a few days and I guess will continue to be for a few more. The three of us are assistant district attorneys in Dallas. We've been assigned by Mr. Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Sitting to my immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

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[1483] that is, there are some difficult issues and not everybody is suited to serve on this type of jury. That's what we're trying to find out, is whether you're the kind of person that is not only qualified, but suited to serve on his type of jury.

I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to a jury and to you, if you're on that jury, sufficient type and quantity of evidence to convince you that he is guilty of capital murder and the sufficient type and quantity of evidence to convince you that the three questions there on those boards should be answered yes, the result of that being the death penalty. If each of those questions is answered yes, Judge McDowell has no option whatsoever but to assess the death penalty.

We do that with the anticipation that, when the death penalty is assessed, at **[1484]** some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically out position going into this thing. I think it is only fair that you know that. That's all the introductory type of talk I'm going to do.

You had a chance on Monday to fill a questionnaire and on of the questions on there, number fifty-six, asked you your feelings about the death penalty. You put that you do not believe in the death penalty.

A. I did.

Q. Can you kind of put in your own words your feelings about the death penalty?

A. We're all big guys. We all talk, yes, if somebody did something, we're going to do out and we're going to kill them, but when you make up your own mind, even though I'm a Vietnam vet and I was not in a combat zone, I was in construction with the engineers, I've seen **[1485]** death. I've smelled death. But to take a person's life and to actually take a person's life, you would have to be a — you know, to say — I don't know that gentleman. I don't know all the facts about him and I don't know how he was reared and how he grew up and the circumstances that led him to do that fatal murder at that time or whatever he supposedly has done — capital punishment is murder, I suppose?

Q Yes.

A I'm not aware one hundred percent of what he did and how he was reared. Sometimes environment brings you to do things like that and I don't know. I can't play God and say that — in my mind, not even knowing the defense, the Defendant or whatever he is — I should take his life.

Q Well, let me cover just a few things with you —

A Now, outside in the field now, I would say — you know, with the guys all talking — ah, yes, let's do away with all these kinds of people, rapists, murderers. It's easy to say out there, but when you're in

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GENE R. HINSON,

[1640] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Can you hear me all right?

A Yes.

Q I tend to let my voice drop and I can get rambling pretty fast, so if I do, slow me down, all right?

A Yes.

Q Mr. Hinson, let me begin by reintroducing every one here. My name is Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q Another lawyer will be joining us once the trial begins. His name is Norman Kinne. Mr. Kinne has the chicken pox. He's about fifty years old, too, so we've been ribbing him, you know, as kind of a late bloomer. We're the lawyers for the State and we're all assistant criminal district attorneys, as I'm sure you may recall from the

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[1645] not be suited because of their personal feelings about the death penalty. Do you see what I'm getting at?

A I understand.

Q That's why we have to go through this laborious and tedious and somewhat repetitious process to get to know somebody and know more about them and see if

they're really suited for this type of case. In the final analysis, Mr. Hinson—well, let me just put it this way at the very outset so you will know exactly where the State stands with regard to he reality of this particular case and this particular Defendant.

We are actively seeking the death penalty in this case for Thomas Joe Miller-El, the man seated right over there. In other words, we know that the law does allow for the death penalty, legal execution. We intend to be able to provide a jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt, as the law requires, that Mr. Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment.

[1646] Then in the second part of the trial, we intend to be able to provide a jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt that all the questions that will be submitted, the two or three questions, should be answered yes which, as you know, will result mandatorially, automatically, without any question or reservation, in the Judge sentencing Thomas Joe Miller-El to be executed by lethal injection down in Huntsville, Texas.

The reason I go through that is, of course, to tell you in all fairness, as we've done every one else that we've talked to, exactly where we stand based on the evidence. Of course, ultimately it is up to the jury to decide based on the evidence and the law. We feel it is only fair to every one on notice as to where we stand.

Of course—as you well know, you're thirty—nine years old. You've been around long enough to know that there was a time in this country when people were being assessed death sentences, but no one was being **[1647]** executed and there was perhaps a time when any juror could probably, in their minds, think, well, it's just not a real thing. We might sentence someone to die, but they haven't executed any one in ten, fifteen or twenty years in some states. That's not the way it is any longer. I think any one—in all fairness to them

and the realization—should realize and expect that if the death sentence were returned in this case, Mr. Miller-El will be executed at some point in time under the law. As you know, that's by lethal injection here in Texas.

Now, with those remarks out of the way, let me just ask you—I know you were asked this question—and then we're going to let you talk a little bit. Like I said, they've heard enough of me. Question fifty-six asks you do you believe in the death penalty and you had precious little time to really think about it, I suppose, and express yourself; but you've had two or three days to sleep in it, I guess; and think about it and mull it over in your mind. Let me ask you to share with us in your own words your feelings **[1648]** about the death penalty and your ability or your inability, because of your personal feelings, to actually serve on this type of a jury?

A Well, I believe I put on the form there that I didn't agree with it for both moral and religious reasons. Not that I've done any tedious investigation, but from what I've—just from the media and what I've read on my own—

THE COURT: Excuse me just a minute.

(Whereupon, an off the record discussion was held.)

THE COURT: That was Mr. Weaver. I wanted to explain to him what had happened. I'm sorry, Mr. Hinson. That was right in the middle of your explanation. Go ahead.

A Well, I was just explaining from a lot of the data that I've read and so forth, it hasn't proved to be that much of a deterrent anyway. Then not only because of that, but just my own personal beliefs in the matter.

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[1787] what he wanted to do at the time that he had the right to shuffle and he did that. Then I turned around and did it according to how the defense wanted it done. Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing

it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuffle wasn't done correctly.

Mr. CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first time, the black jurors were number **[1788]** nineteen, twenty-six, thirty-six, thirtyseven, thirty-eight and thirty-nine, that after the second shuffle those same six blacks are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to Mr. Cunningham telling the Court what this is all about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR. WEST: Judge, Mr. Nelson was standing right by me when I shuffled. Now, he cannot dictate the number of times that the

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[1866] JEANETTE BUTLER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Butler. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson. Another lawyer, a district attorney, will be joining us once the trial begins. His name is Norman Kinne. We haven't seen Norman in a while because he has the chicken pox. He's about fifty years old and he's been disabled, of

course, for about two weeks. It makes a difference at that age.

The gentlemen to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Butler?

Q The gentlemen who was just in here a moment ago is Mr. Royce West. They were introduced to you this morning, also. We are assistant district attorneys who represent the

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[1870] position or try to talk you out of a position. Just tell us how you feel about anything and you'll be doing your job as a prospective juror.

What we're trying to do here is find twelve people who are best suited, twelve that we both agree on, both sides agree on, and can actually serve on this type of case because not every one can. I mean, you're number thirty-eight and we only have two jurors. You can see arithmetically how few people are suited to serve on this type of a case.

Now, let me tell you what our position is just in fairness to you going into this sort of a situation. Ms. Butler, we are actively seeking the death penalty in this case for Thomas Joe Miller-El and we make no apologies for it. We know that the law allows for it under certain circumstances and we intend to be able to provide a jury—and that would mean you if you're on this jury—the type and quality of evidence that would convince this jury beyond a reasonable doubt in the first part of the trial that Thomas Joe Miller-El is guilty of the offense of capital **[1871]** murder. That's our responsibility.

Then in the second part of the trial, to provide the jury with the type and quality of evidence that would convince them that the questions that the Judge would give you at the end of the trial, those three questions there, should be answered in each instance yes, yes, yes. You know that the effect of three yes answers—what is that?

A The death penalty.

Q That's right, automatically. You might as well write death in there. Three yes answers dictates to this Judge, under the law, what he must automatically and definitely do. Now, the reason why I say that is just to put you on notice. You know a lot of people come down here and they're kind of caught up and they don't realize—you know, they think they're going to be on a shoplifting case or a marijuana case or a burglary case and here they are. They're sent down to a jury room where they're talking about death and capital punishment. You see, it's no longer, like it may have been, where you read about something or you talk about it with your husband or **[1872]** people you work with or your friends, about how you feel about the death penalty. You're in the thick of it basically. I don't know of a better way to put it. We just want you to know what the stakes are here and we intend to provide this jury with the type of evidence that ultimately will result in convicting this man and ultimately result in this man and being taken down to Huntsville, Texas, strapped to a bed, a hospital bed, taken [illegible] a room where they will put a needle in his arm and they inject him full of a lethal substance that is going to end up killing him under the law.

Anyone who comes down here, like yourself, as a prospective juror, just in fairness ought to know what the stakes are and what you would be called upon to do under the law based on the evidence if you serve on the jury. It kind of goes back to what the Judge said. The Judge it's kind of like—I know he said this to other jurors that he talked to—it's kind of like you're given a job description. Just like this job you're taking now, I'm sure you wanted to know what it entailed, didn't you?

[1873] A Uh-huh.

Q If it wasn't what you set out for, then you're not going to sign up for it, are you?

A That's right.

Q In fairness to you—and we could hide the ball and say, you just answer these questions and then at the end you find out that someone is being executed what you could see what effect that might have on certain people?

A Uh-huh.

Q All right. I'm going to stop and let you do some talking. It's your opinion that we want to hear. You were asked the question how you feel about the death penalty. They only gave you three lines and you've got almost four lines. There's nothing magic about those three lines. You were given precious little time to think about this. I mean, it's not like you had a week or so to dwell on it.

Would you just tell us in your own words how you feel about the death penalty?

A I think it should be given. The death penalty should be given in certain circumstances. As I said people hurting

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[1945] were held.)

THE COURT: Do you-all want to argue?

MR. CUNNINGHAM: I don't. THE COURT: Let me get on the record, Pam. Mr. Cunningham, I'm going to sustain the State's challenge to Ms. Butler. The court is going to let the record reflect—and I'll let the lawyers challenge me on this. This lady really an interesting juror. I think she was somewhat emotional in appearance from time to time, but I don't have any doubt that—well, she didn't always accept what the lawyers said as gospel or the Judge, for that matter. I think she probably understood what her situation and relationship would be as a juror in this case. After watching her and hearing all of her answers, this Court believes and finds that her views about the death penalty

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[1948] LOUISE CARTER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon. Ms. Carter. As I was introduced to you earlier, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The gentleman seated next to me is Mr. Paul Macaluso. As I think you were told this morning, there will be one other gentleman involved in this for the State of Texas and his name is Norman Kinne. Mr. Kinne who happens to be about fifty years old, is home again this week with the chicken pox and has been for a couple of weeks. We've given him a little bit of a hard time about that. He will be presenting the evidence for the State of Texas in this case. The three of us are all assistant district attorneys and have been assigned to this case by Henry Wade, the elected district attorney, to handle it for the State of Texas.

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[1998] minutes and you'll be on your way one way or the other.

Ms. Carter, maybe I don't need to send you out. Maybe I can decide this. Ms. Carter, I'm going to excuse you from service in this case. I'm going to sustain the State's challenge. Off the record, Pam.

(Whereupon, there was an off-the-record discussion, after which these proceedings were recessed to Tuesday, February 18, 1986, at which time the following proceedings were held.)

THE COURT: I want to ask you to make yourself as comfortable as possible. Sometimes that is easier said than done. The reason you're up there is because it gives us a chance to hear you and the lawyers to see you better from up here and everything. The only thing I want

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[2050] SHEILA WHITE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. White. I want to start out by reintroducing every one who you met at least briefly yesterday. My name is Jim Nelson. The man seated next to me is Mr. Paul Macaluso. Another man who will be involved in this trial once we start putting on evidence is a gentleman by the name of Norman Kinne. Mr. Kinne, who is about fifty years old or so, has been suffering from the chicken pox and we've been giving him a little bit of trouble about that. When the trial starts, he will be presenting the evidence and taking, what we call, the lead in the case. The three of us, Mr. Macaluso, Mr. Kinne and myself are assistant district attorneys. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated immediately to my left is

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[2053] that's all we ask of you.

Now, I feel like you have a right to know at this point, Ms. White, what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty in this case for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to twelve persons on a jury the type and quantity of evidence for them to, first of all, convict him of capital murder and then in the punishment phase, enough evidence for them to answer those three questions there yes. If each of those questions are answered yes by the jury, that results as a matter of law in the death penalty. At that point Judge McDowell has no option whatsoever. If those three questions are answered yes, then Judge McDowell must—is required to assess the death penalty in this case. If one of those questions is answered no, then Judge McDowell is required to assess a life sentence. There is no option. He has no discretion in this matter at all. It's up to the jury and it's the jury's decision.

That's where we are and that's [2054] what we're planning to do. With that—you filled out a questionnaire yesterday and I know you didn't have a whole lot of time to think about it and all this was kind of sprung on you. Most people come down here expecting to be on a civil case or a shoplifting case or something like that and you wind up on a capital murder case. There was one question on here about the death penalty and now that you've had time to think about it a little bit more and, I guess, sleep on it, I'm going to ask you, if you would, to just tell us in your own words how you feel about the death penalty and whether you feel it serves a purpose in our society or not?

A I don't disagree with the law, that there is a death penalty, but for my own self, I cannot in all consciousness, you know, say that someone is guilty and, yes, they should be executed.

Q Okay. Let me—you're the forty—first person we've talked to in one way or another in trying to select this jury. We have two jurors at this point. You can see from that that we've got one in twenty so far that

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[2103] JOAN E. WEINER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Weiner. Ms. Weiner, let me begin by introducing every one here. I'm Paul Macaluso. This if Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial begins, we will be joined by another assistant district attorney. His name is Norman Kinne. Mr. Kinne is not here primarily because—he may be here today. He's recovering from a bout with the chicken pox. I haven't seen him in over two weeks myself. He's about fifty years old, too. We've been ribbing him a whole lot. We're the lawyers for the State and we're representing the district attorney's office of Dallas County in this particular case. I'm sure you already knew that.

To Jim's immediate left is Mr. E. Brice Cunningham.

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[2107] much as you can.

There are no wrong answers and no right answers and no one is going to grade you obviously when it's all over with. The idea is to just get you to relax and tell us how you feel and how you think. If you're just as straight with us as you can be and we ask the right questions, then you will be doing your job and we'll be doing ours.

Ma'am, you know as well as I do that no one is going to quarrel with you or argue with you or talk you into anything or out of anything. Just tell us what is on your mind about anything. I don't care what it is. By all means, if I'm not making myself clear, let me know. You're not going to hurt my feelings. If you have a question, ask it. If you have something you would like to tell us that wasn't covered by the questionnaire or our discussion, in fairness to both sides, just let us know what it is.

Now, let me tell you, in fairness to both sides, what our position is in this particular case. Ms. Weiner, we are actively seeking the death penalty in this case for **[2108]** Thomas Joe Miller-El. We know that the law allows for the death penalty in a capital murder case and we intend to be able to provide this jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that the Defendant is

guilty just exactly as he's charged in this indictment of capital murder.

Then in the second part of the trial, we intend to provide that same jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that the questions—and they're over there and we'll talk about them a little bit later—the Judge would submit at the end of the trial for the jury to answer should be answered yes. As you know, three yes answers equal a mandatory, automatic sentence of death for Thomas Joe Miller-El or anyone else so charged. We just want to put you on notice just as we've told every other juror that we've talked to just to let them know what the stakes are and what we intend to prove based on the evidence. **[2109]** Now, it's up to the jury to decide whether or not we've met that test and that's obviously where you come in as a juror, so we think it only fair to let you know at the outset what our position is.

Now, with those remarks aside—and I've done more than enough talking to this point. We want to hear what you have to say. I know you were asked this question fifty six, "Do you believe in the death penalty?" and they give you a couple of lines there and a few minutes, I guess, to answer it along with some other questions. Would you share with us, all of us here, your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?

A Gosh. I do believe in the death penalty. I could render a verdict that way, but it's a lot easier for me to say at home that beyond a shadow of a doubt, yes, I do. I mean, I do believe in the death penalty. I

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[2132] reasonable doubt. If we don't, you find him not guilty. In the second part of the trial, we have to satisfy you and convince you beyond a reasonable doubt that those three questions should be answered yes, otherwise you have to answer them no.

A Right.

Q You just let the chips fall where they may and let the law take its course and no one is going to quarrel with you.

I have just a few minutes left, Ms. Weiner, and I want to ask you some very important things. I'm not suggesting that this would occur, but let's just imagine for a second: Let's say you're on a hypothetical jury, a capital murder jury. Murder during a burglary, that's a type of capital murder. You know we have to prove murder and burglary if we expect you to find someone guilty of capital murder?

A Right.

Q Let's say you're on this jury and you hear all the testimony and you and the other jurors are convinced that a defendant killed the victim and there's no question about **[2133]** it. It was murder, but you didn't hear any testimony about the burglary or you have a reasonable doubt about that. Do you understand under those circumstances, if that were to happen, you couldn't find that defendant guilty of capital murder, could you?

A No.

Q Because we didn't prove capital murder, did we?

A Right.

Q We just proved murder?

A Right.

Q So you find the Defendant not guilty of capital murder and find him guilty of what we did prove, which was what? Murder.

A Murder.

Q Were that to happen, the law sets out a completely different range of punishment. I think the Judge talked

about that a little bit yesterday. There is no trick to it. The law simply expects, to be a qualified juror on a murder case, regardless of your personal feelings on whether a person should get death, life—do you understand first off in a murder case that a person cannot receive the death **[2134]** penalty?

A Right.

Q The range of penalty is broad as for any offense under the law. I think the reason it is that broad is because the law allows you to take into consideration, you and the other jurors, the infinite number of circumstances under which one person could knowingly, as the law says, or intentionally cause the death of another individual. Now, I want you to bear in mind that we're not talking about a murder where someone acted in self-defense or was crazy or insane or a crime of passion or an accident because those aren't murders. If you believe that, that wouldn't be murder. In other words, you wouldn't set a low penalty because you thought someone acted in self-defense. If you thought someone acted in self-defense, you would find them not guilty?

A Right.

Q Do you see what I'm getting at?

A Uh-huh.

Q We're talking about murder. You know as well as I do—we've both lived long enough to know that one person can kill another **[2135]** person for all different reasons?

A Right.

Q They may not be legal reasons, but they run the gamut, don't they?

A Right.

Q All murders involve the loss of life, but the law says obviously some are worse than others?

A Yes.

Q All the law says is this, and I think you can do this: All the expects [sic] of a juror in a murder case, number one, is to keep an open mind, follow the law and just tell us you

will wait and listen to all of the evidence, wait until all of the facts are in before you make a decision. You're not going to jump to any judgment or anything like that. You haven't heard any facts in a murder case, have you?

A No.

Q No one is going to force you into any particular position, but the law simply says this: To be qualified, you have to say I'll have an open mind and whatever the law is, I'll follow it whether I agree with it or I **[2136]** don't agree with it. The law says you wait until you hear all of the evidence and if you hear a fact situation for murder—and no one is expecting you to think of a particular fact situation, but when you feel it is proper based on the evidence once you hear it that calls for, under the law—you see provided for by law—you can assess the punishment, as the old cliche goes, to fit the crime. In other words, you decide it after you hear the evidence. Do you see what I'm getting at?

A Uh-huh.

Q In other words, if you hear a case—let's imagine you're on a jury. After all the evidence is in, you hear a case, to your way of thinking after you've heard the evidence, calls for, warrants and justifies the minimum, whatever that may be, you will give the minimum?

A Right.

Q On the other hand, if you hear a case of murder that calls for and warrants and justifies and it's the right thing to do to give the maximum, you will give the maximum whatever that is?

[2137] A Yes.

Q Can ~~you do that~~?

A Yes.

Q Even though you may not want to give the minimum or you may not, as you sit there now, be inclined to give the minimum, you don't know, do you?

A No.

Q Why?

A Because you haven't heard the facts yet.

Q That's right. That's all the law expects, to keep an open mind and wait until you hear all the evidence. In other words—you see, the range of penalty for murder is from five years in the Texas Department of Corrections up to ninety-nine years or life and you can even add on an option of a $10,000.00 fine. I gather from what you've said you are the type of person who has an open mind?

A Yes.

Q You have told us that you will follow the law and you will wait, if you're on a murder case and called to make that decision, until you've heard all of the evidence?

[2138] A Yes.

Q If you hear a case, to your way of thinking calls for and warrants and justifies five years, you'll give it?

A Yes.

Q Even though it may be a rare case. Do you see what I'm getting at?

A Yes.

Q The same thing would hold true for the maximum. If you hear a case that calls for and warrants and justifies—you know, the facts call for it—a ninety-nine year or life sentence and a $10,000.00 fine, you will do that because the law and the facts call for it?

A Yes.

Q You understand that it may be difficult and the law presumes that it might be difficult to give the maximum. You're going to have to hear special facts before you would give someone ninety-nine years or life?

A Right.

Q The same thing would hold true for the minimum. You would have to hear special facts to satisfy you that the minimum was deserved, to give five years. If you do hear **[2139]** those facts, you will give five years, won't you?

A Yes.

Q Or anywhere in between?

A Uh-huh.

Q I think I'm out of time, Ms. Weiner.

MR. MACALUSO: Is that correct, Judge?

THE COURT: Yes. You're over time.

Q Let me just ask you one question, Ms. Weiner. I notice that you have some relatives that are in police work?

A Yes.

Q You understand, when the Judge went over this the other day, that you judge all witnesses by the same yardstick. In other words, it doesn't matter whether a witness is a police officer, a psychiatrist or a skid—row bum, you apply the same yardstick in deciding how much or how little you wish to believe. You wouldn't automatically believe a police officer before be gets on the stand because you say police offices always tell the truth. You

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[2158] From what we've heard, it appears that you are qualified—well, as we get what you've seen on TV out of your mine.

A Right.

Q You say your son was ten years old at the time he was arrested?

A Yes.

Q In other words, be was not handled down here. It was out at the juvenile home. Was it at the juvenile home?

A No. It was downtown. We had to pick him up down there. We lived in Richardson, but he was at K-Mart in Dallas so he was taken to the Dallas police station.

Q You indicated that you do believe in the death penalty, but you don't know why. You just do.

A Yes.

Q In other words, some people say that is the maximum and I think that it deters—I think it may prevent other

people or something like that, a million number of reasons. Then there are some people like yourself who say I believe in it and I just don't know why, but I do and I've always felt

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[2242] RONALD P. SALSINI,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Salsini. Let me begin by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson and once the trial begins, we will be joined by Norman Kinne. We are all assistant criminal district attorneys here in Dallas and we're representing the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Salsini?

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Salsini, how are you doing, sir?

Q As you may recall from the introductions yesterday, they are the defense attorneys who have been appointed by Judge

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[2246] you or anything like that. Just tell us how you feel and you will be doing your job and, if we ask the right questions, we'll be doing our job.

Now, if you have a question, by all means ask it because there is a lot of stuff we're going to be throwing at you and things we're going to be talking about. If I'm not making myself clear at any time, by all means stop me and let me slow down, whatever the case may be. No one is going, like

I said, to talk you into or try to talk you out of a position at all. Just tell us how you feel. If there is something that you need to tell us, whether we cover it or not, by all means, just in fairness to both sides, let us know what it is.

Now, let me tell you what our position is in this case. Just to be fair with you, as we have done with forty-three other jurors that we've talked to, we are actively seeking the death penalty in this particular case for this particular Defendant, Thomas Joe Miller-El. We're not making any bones about it. We know that the law allows for it and we **[2247]** intend to provide the jury, that meaning you if you're on the jury, with the type and the quality of evidence that would convince you beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he's been charged in this indictment and nothing else.

That's done in the first part of the trial. Then we intend to be able to provide the jury in the second part of the trial, where the penalty is actually determined, once again with the type and the quality of evidence that would convince them beyond any reasonable doubt that those three questions should be answered yes. You know the effect of all yes answers is a mandatory sentence of death by lethal injection.

Now, that's just our position. Obviously it depends on the evidence and depends on the decision made by the jury, but I want you to know, like we let the other jurors know, just exactly what we're trying to prove and we intend to prove during the course of this trial and what the law allows under a certain type of evidence.

[2248] Now, with those remarks aside, like I said, you're the one whose opinion is the most valuable here this afternoon. We want to know how you feel. Let me just ask you. I know you were asked this question fifty-six, how you feel about the death penalty, but you only had a few minutes to answer it and a few minutes to think about it. In your own words, why don't you just tell us how you feel about the death penalty generally speaking and your ability to actually serve on this kind of a jury?

A I was thinking about it as we talked about it yesterday and I've been thinking about it since we left there. I believe in the death penalty because it is a good deterrent and everything—the only deterrent for a crime like that. As far as—is it my decision as far as on a jury, I think I could make the decision, but I would really have to think about it long and hard before I could make that decision.

Q Sure. Naturally, given the magnitude of any decision in this type of case, anyone would expect you to consider the

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[2251] see what I'm getting at? That would be one thing. If it would just be a difficult situation, then that wouldn't be a reason. Do you see what I'm getting at?

A Uh-huh.

Q Allowing that anybody serving on this type of case would take it serious—at least I hope they would. I would.

A Right.

Q Are you saying that you just would evaluate the evidence carefully or are you saying that there might be a situation arise where you, in all honesty, feel that the magnitude of the situation is such where your personal feelings about making a mistake or whatever it might be might bother you for the rest of your life?

A I think I could make the decision, you know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future.

* * * *

[2270] Q One or more no answers, life?

A Right.

Q Let's shift our thinking for just one second away from automatic life or death and let's talk about a situation that I'm not suggesting will occur in this particular case, sir, but I want to talk to you about it briefly. That's a situation where, once again, you're on a capital murder jury. Somebody is charged with capital murder. Let's say murder during a burglary. That's one type. You're convinced beyond a reasonable doubt that he killed somebody, that it was murder, but you have a reasonable doubt as to whether it occurred during a burglary. You don't hear any testimony about a burglary. We have to prove both if we expect you to find him guilty of capital murder, don't we?

A Yes.

Q We didn't do that, did we?

A Right.

Q So you found him not guilty of capital murder and you found him guilty of what we did prove to you, which is what?

A Murder.

[2271] Q If that happens, if that really happened, murder has a totally different range of penalty. It is no longer mandatory life or death. It is as broad as any punishment under the law, five years to ninety-nine years or life. The legislature has set that range of punishment broad enough so you, as a juror and the eleven other jurors, can encompass—you can tailor a punishment based on the infinite number of circumstances, backgrounds and relationships where one person ends up murdering another person. We all know that all murders are bad, where one person knowingly or intentionally causes the death of another person without any legal excuse or legal justification, but there may be a myriad of nonlegal reasons, mitigation let's say, why one person murders another person.

The law simply says to be qualified as a juror all you have to do is tell us—and I think you can do this, Mr. Salsini—one, that you will follow the law; two, that you will keep an open mind and wait until you've heard all of the evi-

dence so you can make a decision and then you will simply **[2272]** tailor the punishment to fit the crime within the limits of the law. Can you do that?

A Yes.

Q In other words, if you heard a case that you felt—no one is committing you right now. Whether you can think of one or not, it doesn't matter. Just tell us that you are an open-minded individual and you will follow the law and if you do hear a case, after you've heard the evidence, to your way of thinking calls for, warrants, or justifies the minimum—and you know the minimum is five years—you will give five years.

A Right.

Q By the same token, if you hear a case, where the facts and circumstances in a murder case calls for, warrants and justifies the maximum—and you do know what the maximum is, ninety-nine years or life and a $10,000.00 fine—you would give that?

A Yes.

Q The cases may be few and far between that you would give five years or ninety—nine years or life, but you just tell us that you will wait until you hear the evidence **[2273]** and if you feel that it's proper, you will give it after you've heard the evidence, either one or the other or anywhere in between?

A Right.

Q Any problem with that at all?

A No.

Q Two very short things here and then I'll let the other lawyers talk to you. You understand what the Judge said about a conviction on the testimony of one eyewitness? There may, in many instances, like when your home got robbed, be only one eyewitness to that offense or a lady is raped or whatever the case may be. The law says that a conviction can be based on just one eyewitness if you believe

the eyewitness is capable of testifying as to the actual events. Do you see what I'm getting at?

A Yes.

Q The question to you, sir, is, could you base a conviction in a capital murder case or a murder case, for that matter, on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A With no other evidence at all?

* * * *

[2345] CHATTA J. NIX,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Nix. I want to reintroduce everybody to start things off. My name is Jim Nelson. The man seated next to me is Paul Macaluso. There is one other lawyer that will be involved in this who isn't here today and his name is Norman Kinne. He will be presenting the evidence for us. Mr. Kinne and Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned by Henry Wade, the elected district attorney to handle this case for the State of Texas.

Seated immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Nix.

Q Next to him is Mr. Royce West.

MR. WEST: Mr. Nix, good morning.

[2346] Q These two gentlemen have been appointed by Judge McDowell to handle the defense for Thomas Joe Miller-El. He's the man at the far end of the table. You might be able to see him if you lean forward a little bit there. As you know by now, Mr. Miller-El is charged with the offense of capital murder. He's been indicted by the Dallas County Grand Jury for that offense.

Now, that is the most serious criminal offense any person can be charged with in the State of Texas. I don't recall from looking at your data sheet. Have you served on a jury before, ma'am?

A No, I never have.

Q If you had -- you remember Monday morning, you-all sat out there in a group of about forty of you and we talked to you a little bit at that time. A normal jury selection process most of the voir dire would be done in that kind of situation. We talk to you out there and if we have any questions, we would ask them there in front of the group.

Because we're dealing with capital murder and there are strong feelings on both **[2347]** sides in this type of case, the law allows us to talk to you individually as we're doing this morning. Our hope is that, if you don't have to speak in front of forty or fifty people, you will be able to relax a little more and be a little more open with us and not be concerned about what the other forty or fifty people out there may think about what you have to say and how you're saying it or something.

What I'm getting to is, I want you to relax just as much as you can and remember that there are no right or wrong answers to anything I'm going to ask you or any of these lawyers are going to ask you. We're trying to find out how you feel about some things. We know that there are some strong feelings one way or the other on these issues and, although I'm going to be doing a lot of the talking, I want to know how you feel.

If I confuse you or if I don't make myself clear about something or you have a question, I hope you will stop me and let's get it straightened out so we're understanding each other as we go through this. If you will do that for me and remember that there are no **[2348]** right or wrong answers and answer the questions just as best you can, that would sure help us a great deal.

Now, Ms. Nix, I feel it is only fair to you that we tell you going in what our position is. We, meaning Mr. Kinne, Mr. Macaluso and myself representing the State of Texas, are actively seeking the death penalty for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to a jury, twelve people, the type and the quantity of evidence which will convince them to find him guilty of capital murder and the type and quality of evidence that will convince them to answer those three questions there on the boards yes.

If each of those questions is answered yes, that results in Judge McDowell assessing the death sentence in this case, no options, no considerations, no going back. That's how it works. We'll talk to you a little more about that as I go on here, but that's our position. We're actively seeking the death penalty and we will continue to do so throughout the trial with the anticipation that **[2349]** those questions will be answered yes, the Judge will sentence this Defendant to death, he will be executed down in Huntsville, Texas.

Now, you had a chance yesterday to fill out a questionnaire -- Monday I guess it was -- and you didn't have a whole lot of time. We were moving you in and out of the courtroom and had you running around a little bit and you didn't have a whole lot of time to think about it. There was one question on there about your feelings about the death penalty. You answered it fairly completely, but you've had a couple of days to sleep on it and think about it some more, I would guess. I'm going to ask you, if you would, just in your own words, to tell us how you feel about the death penalty and whether you feel it serves a purpose in our society?

A Well, I do believe in the death penalty. I wouldn't want to use it just haphazardly or just for the sake -- just because we can or because it is allowable. I believe -- in my own personal mind I make a distinction between what murder is and what the taking of a life can be. I don't know if the **[2350]** law does that or not. A man who is murdered, whose life is taken recklessly, is a bad thing. I don't know the best way to put it. To kill is not necessarily to murder, although

murder is always a killing. I don't believe that the death penalty, given to a man who has committed a violent murder and may do so again and may be hesitant before -- I think to administer the death penalty in that situation is killing and is the taking of a life, but it's not murdering that man. It's a self-defense for society. There is a justification for taking that life.

Q Okay. So you feel that it is justified in that -- well, to paraphrase what you said, society has a right to defend itself?

A Yes.

Q I believe you also noted in your answer that you believe it is a deterrent, also?

A I don't know.I was just thinking about this earlier today. I don't know that right now in our society that it is, but I think, if it is not, it's because it's our own fault for not allowing it to be used maybe a little bit more swiftly and more harshly, if **[2351]** that's the word to use. I could be and I think it should be.

Q Okay. Is this something that -- a belief that you've held for quite a period of time?

A Yeah. I guess for as long as I've really ever asked myself the question.

Q Let me talk to you a little bit more about Texas law and I don't know how familiar you are with it. You've obviously given this a great deal of thought. In the State of Texas, the death penalty is only appropriate in one type of crime, a crime called capital murder. Now, that encompasses three or four different types of offenses.

One type is the killing of a specific type of individual, for example, a police officer or a fireman on duty or a prison guard on duty or something like that. Another type is murder for hire. For example, if I hire Mr. Macaluso to kill my ex-wife or something, he can be prosecuted for capital murder and so could I. The third type is mass murder. You may remember the Ionni's killings a year or two ago. The legislature has decided **[2352]** now that that is appropriate for

capital punishment. The fourth type is the type we're dealing with in this case and it's what we call murder plus. It's not only murder, but it's murder in the course of committing another offense, for example, a murder in the course of a burglary or an arson or, in this case, a robbery or a rape. What that basically means is, Ms. Nix, is that we have to prove, number one, that a person knowingly or intentionally caused the death of another individual. Then we have to go further to prove that it was done in the course of committing or attempting to commit the offense of robbery in this particular case.

Now, those things basically -- you said that the death penalty should not be used haphazardly and no one in here is going to disagree with that. I'll guarantee you. Do those types of crimes generally fit with the type of crimes that you think capital punishment is appropriate?

A Yes.

Q Okay. Now, Ms. Nix, I want to talk to you just a little bit about the **[2353]** procedure we're going to go through in this trial, if you get on the jury. Once the jury has been selected, after that the trial is basically two phases. The first phase is what we call the guilty or innocence phase of the trial. It's at that time that we have to prove to you that this Defendant is guilty of capital murder. It is at that time that we have to prove those two things I told you about; first, that he knowingly or intentionally caused the death of another individual without any legal justification or excuse. That's murder, and then that he did that in the course of committing or attempting to commit robbery. Now, we have to prove that to you beyond a reasonable doubt.

That burden of proof is here on this table with Mr. Kinne and Mr. Macaluso and myself. It never moves over to that table. The defense never has anything that they have to prove. They never have anything that they have to disprove. As a matter of fact, you never have to hear a word out of their mouths through the whole trial, but if we don't prove our case beyond a reasonable doubt, it is your **[2354]** duty to find him not guilty. Are you with me on that?

A Yes.

Q Part and parcel of that is, the Defendant sitting down there never has to testify. He has an absolute right not to testify. If he chooses not to testify, you can't consider that. You can't talk about it, discuss it and you can't even think about it. It can't come up in your deliberations one way or the other and it can't have any effect on your deliberations. Am I making myself clear about that?

A Yes.

Q Okay. If you find the Defendant guilty of capital murder, then we move to the second phase of the trial, what we call the punishment phase. Now, under the old law, up to about thirteen years ago, the jury on a capital murder case would listen to evidence and then they, would go back into the jury room and make a decision, life or death, and write either life or death on the jury form and sign it. About twelve or thirteen years ago, the legislature put a different procedure in there. **[2355]** It said that the jury, instead of just saying life or death, must answer questions based on the evidence and we must prove to you that the answers to those questions should be yes. We must prove that to you beyond a reasonable doubt. Again, the burden of proof is here, Ms. Nix, and it never shifts over there. They don't have to prove to you that the answers to any of those questions should be no. We have to prove to you that the answers should be yes. If we don't or if you have a reasonable doubt about it, you have to answer those questions or any of those questions no, if you have a reasonable doubt. Am I making myself clear?

A Yes, sir.

Q Okay. The three questions I'm talking about are those three there on the boards. If you will, why don't you just take a minute and read those over.

A (Juror complies.) This third one is getting me.

Q The third one, everybody has trouble with that. It's a little bit convoluted. It's typical lawyer wording, I think. Let me emphasize one other thing while **[2356]** I'm thinking

about it. I talked about the fact that we had the burden of proof and we have to prove beyond a reasonable doubt. Well, that's because this Defendant down here is presumed to be innocent at this point. Now, if you were called upon to deliberate his guilt or innocence right now, you would have to find him not guilty because we haven't presented any evidence.

A Right.

Q His presumption of innocence doesn't mean that he isn't guilty, but we have to prove it to you. We did the accusing and we've got to do the proving is an old saying.

Let's look at the questions. I want to emphasize again, Ms. Nix, so I'm sure you understand it, a yes answer to each of those three questions results in the death sentence. You aren't saying death any more, but the effect is the same. If those three questions are answered yes, Judge McDowell has absolutely no discretion -- he cannot say, well, I don't agree with that and give the Defendant a life sentence. He must assess the death sentence if those three are answered yes. **[2357]** By the same token, if any one of them or more than one is answered no, then Judge McDowell must assess a life sentence. Again, he has no discretion and no option. So even though you're not writing life or death, you're having the same effect; would you agree with me on that?

A Yes.

Q Okay. Now, let's look at question number one. "Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" What basically do you think that's asking, Ms. Nix?

A Did he knowingly commit the crime and knew what the result -- you know, at the end of committing that, that a person would be dead.

Q Okay. It's pretty straight forward. I don't mean to act like there's something in there that's not, that you can't see. It's pretty straight forward. For example, if you were standing there and you saw me pull a gun out and put it to

Mr. Macaluso's **[2358]** head and pull the trigger, it would be pretty clear that I did it deliberately and with the reasonable expectation that he was going to die as. a result. If I took a gun out and tried to shoot him in the foot for some reason and the bullet bounced off the floor and off the wall and the ceiling and came down and hit him in the head, then you're going to have a question whether I expected that his death would result?

A Yes.

Q Would you agree with me that that's the kind of thing that they're looking for?

A Yes.

Q Okay. There aren't going to be any definitions of any of the terms in these questions coming from the Judge in the Court's charge. There won't be any definitions at all. We're going to ask you to put your everyday common sense, common usage, meaning on the words in these questions. Let's look at number two. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society." What do you think they're **[2359]** looking for there, Ms. Nix?

A If I believe that there is a chance that someone would commit criminal acts -- were to be on our streets again, that they would definitely be a threat to society, to some other person or more than one person.

Q Would you agree with me that the word probability is probably a fairly key word in that question?

A Yes.

Q What does probability mean to you?

A A likelihood.

Q Okay. And it talks about criminal acts of violence. That doesn't necessarily mean another murder. There are other things like a rape or a robbery, an assault. Would you agree with me that all those are criminal acts of violence?

A Yes.

Q Even if I, for some reason, took a baseball bat and I beat Mr. Macaluso up beside the head with the baseball bat, that would be a criminal act of violence.

Now, you're going to hear the facts of this particular case in the first **[2360]** phase of the trial. Would you agree with me, in most every event you can think about, there are three maybe arbitrary divisions, the time before the event, the time during the actual commission of the event and the time afterwards. Can you see how those three things and what happened during those periods of time might help you in answering question number two? For example, before the event; was this planned or was it a spur of the moment thing; if it was planned, was this Defendant involved in planning it or was he just kind of a bystander; did he help in some way? During the actual commission of the crime what did this individual do; was he a leader; was he giving orders or was he kind of on the outskirts being just a look-out or something; was he running the thing; could he have done something less than what he did that wouldn't have resulted in the death of another individual? Third, afterward; how does this person feel; how does he act; does he feel remorse; is he sorry for what has happened?

MR. WEST: Your Honor, I'm going to object at this point in **[2361]** time for purposes of the record. I would object to improper voir dire. Counsel is commenting on the right of the accused not to testify or produce any witnesses.

THE COURT: Well, I'll overrule that, Mr. West. Go ahead.

MR. WEST: Note my exception.

THE COURT: You will explain, I think, will you not? I mean, you understand, Ms. Nix, the Defendant in this case or in any case has no obligation to bring any evidence to this jury. You must, as a juror, if you're selected in this case, base whatever verdict you reach, whether it be guilt or innocence or punishment, only on the evidence that you heard in the case. I've stopped the time, Mr. Nelson.

For that reason, if a **[2362]** defendant in a case should not testify, I would give the jury a written instruction that they may not consider that for any purpose, may not even discuss his failure to testify among themselves and may not take it into consideration as any evidence of guilt or as punishment. I think I understand what Mr. Nelson is saying and what Mr. West objected. It may go to a different part, but it may sound like the same thing to someone who is not a lawyer. Do you understand the instruction?

MS. NIX: Yes, sir.

Q Okay. Ms. Nix, I may be mistaken, but I thought we covered that a few minutes ago, that the Defendant had a right not to testify and I think he knew he had the right not to testify. Would you agree with me that you could look at whether or not he felt bad about what had happened, whether or not he was sorry or was it just another day at the office kind of thing or what acts was he involved in **[2363]** after the crime? Can you see how looking at those three things would help you in answering questions number two or could be a basis for the answer to question number two?

A Yes, sir.

Q Is there some other type of evidence or something special you would want to hear about to answer question number two?

A It's like you said, all I've got to go on is the evidence that you-all present. That's your job.

Q Okay. Fair enough, and we accept that job. As I think I told you at first, we plan to present what we believe to be sufficient type and quantity of evidence to help you answer those questions yes if you're on this jury. I want to emphasize that, as you just said, you will listen to the evidence and make your decision based on the evidence and we're going to ask you to keep an open mind about answering those questions until you've heard all the evidence.

If the answers to the questions should be yes, you'll answer them yes. If they should be no, you will answer them no. You can **[2364]** do that, I think?

A Yes, sir.

Q Okay. Let's look for just a minute at question number three. "Was the conduct of the Defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?" That's a little involved and convoluted. I think basically what it is asking, Ms. Nix, was it a provoked killing or an unprovoked killing. Obviously, if it was an unprovoked killing, you would answer that question yes because his conduct was unreasonable. If it was a provoked killing, you're going to have to look at the facts and make a decision whether his conduct was reasonable or unreasonable. You may get question number three and you may not. It depends on whether it's raised by the facts and by the evidence. If you don't get it, the sentence will be determined by just the first two questions. A yes answer to both of those, again, means the death sentence. A no answer to either one means a life sentence. Those are the only two options in a capital murder, either death or life. **[2365]**

That life sentence is subject to the same rules and regulations and considerations as any other life sentence that is given in the State of Texas. Can you see, Ms. Nix, how each of those questions can be answered either yes or no depending on what the evidence is?

A Yes, sir.

Q We talked about how the old law used to be. I'm not real sure why the legislature started asking questions or put the law that way, but I guess it's a buffer. Lots of times you will hear a case or hear a set of facts and have a gut reaction, a very strong feeling, that something ought to happen because you're mad about it. You're enraged about it or whatever. Could you -- let me start out this way: The law requires you to answer these questions based on the evidence and not based on your emotions, but based on the evidence. Even if you, after you heard all the facts and circumstances, if you were so enraged in your mind that this guy has to

have the death penalty and there's no questions about it, he needs to die, if we failed to prove to you that **[2366]** one of those questions should be answered yes beyond a reasonable doubt, could you answer it no?

A If the evidence isn't there, you can't answer it yes.

Q Okay. Even though you're angry and you're mad and if it was just up to you to put life or death and you would put death, you could answer one of those no if we didn't prove it to you?

A Yes, sir.

Q Okay. Vice versa, the same way, if we proved all three of those to you, that they should be answered yes, even if you didn't feel like he ought to get the death penalty, could you answer each of them yes?

A Yes, sir.

Q Any problem with that at all?

A No.

Q What you're telling us is, you will listen to the evidence and base your verdict on the evidence; is that right?

Yes, sir.

Q That's all we're asking you to do, is keep an open mind and listen to the evidence **[2367]** and if we prove to you that he's guilty of capital murder, we're going to ask you to find him guilty. If we haven't done that, whether he testifies or they put on any evidence or not, if we haven't done that, it's your duty to find him not guilty?

A Right.

Q By the same token, if we prove to you that those questions should be answered yes, we're going to ask you to answer them yes and if we haven't, again even if you haven't heard a peep out of the defense, if we haven't proved those to you, we're going to ask you to answer one or more of them no, whichever ones we haven't proved. Are you with me up to this point?

A Yes, sir.

Q I get to talking kind of fast sometimes and I know I'm throwing a lot of stuff at you. I want to law school for three years and still understand about three-fourths of this, so I just want to be sure we're clear on it.

Now, one other thing that may come up and we don't anticipate it will in this **[2368]** case, but we need to talk about it now. I told you what we have in this case is what we call murder plus. Now, the death penalty is only appropriate in Texas for the offense of capital murder. If we proved to you that a defendant knowingly or intentionally caused the death of another individual without any legal justification or excuse, but we failed to prove to you that it was in the course of committing a robbery or in the course of committing any other offense, then we haven't proved to you capital murder, have we?

A Right.

Q We've just proved murder. Now, in Texas for just murder, there is no death penalty. The range of punishment is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. Now, when we talk about murder in Texas, Ms. Nix, you hear in other states, on TV, or whatever, about first, second or third degree murder and that kind of thing. In Texas we have murder and that's the knowing or intentional taking of another human life without any legal justification or excuse. We aren't talking **[2369]** about self-defense because, if self-defense is found in a case, the person is not guilty of murder. It's justified. If it is an accident, the person is not guilty of murder or, if it is reckless, he may be guilty of involuntary manslaughter or something, but again it's not murder. If the person is insane at the time, he's not guilty of murder. If it is a killing in the heat of passion -- for example, I have a -

MR. CUNNINGHAM: Your Honor, we will object to him giving any type of factual situation to indicate an involuntary or voluntary manslaughter.

THE COURT: I'll overrule that. You're describing voluntary manslaughter?

Q I just wanted to describe -- if something happened to my little girl and I was so enraged about what happened and I found the person that did it and they were laughing about it and I went and killed the person, that might be under the heat of passion, what we call the immediate influence of sudden passion arising **[2370]** from an adequate cause. That's not murder. That's voluntary manslaughter. When we talk about murder, we're talking about the knowing or intentional killing of another human being without any of those legal justifications or excuses.

Again, the range of punishment for that, if you find that, is anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. Would you agree with me, Ms. Nix, that there is a myriad of circumstances under which one person could kill another person, all kinds of surrounding facts and circumstances could come into that, and the jury would be allowed to consider the surrounding facts and circumstances, not legal defenses, but the surrounding facts and circumstances.

The legislature has made that very wide range of punishment so all those things can be considered. In order for you to be qualified to serve on the jury, you have to be able to tell us that you can consider and assess, in a proper case, the entire range of punishment. You don't even have to be able to **[2371]** sit there right now and think of a situation where you would give life for murder. You don't have to be able to sit there and think of a set of facts and circumstances where you would give five years for the offense of murder. What we have to know from you, Ms. Nix, is if, after you've heard all the facts and circumstances of the case -- you've convicted a person of the offense of murder, the knowingly or intentionally killing of another individual without any legal justification or excuse, after you've heard all of that and you've heard everything you're going to hear on the case, all the facts on the punishment phase, also, if you believed a life sentence is called for by the evidence and warranted by the evidence in your own mind, could you give a life sentence?

A Yes, sir.

Q By the same token down at the other end, again, after you heard all of the facts and circumstances and a person is convicted beyond a reasonable doubt of murder, you've heard everything you're going to hear, if you're convinced in your own mind that a **[2372]** five year sentence is appropriate, could you give it?

A Yes, sir.

Q Okay. All we're asking you to do is keep an open mind as to all the evidence and listen to everything before you make a decision. If after you've heard all the facts and circumstances, they call for five years, you cannot only consider that, but you can give it?

A Yes, sir.

Q If it calls for life, you could do that or anywhere in between, twenty-three and a half years, sixty-seven years or whatever it may be, you will give whatever is justified in that range of punishment?

A Yes, sir.

Q You haven't closed your mind to one end or the other or anything in between; is that right?

A Right.

Q Do you have any problem with that at all?

A No, sir.

Q A couple of other things just to **[2373]** finish up here. There are certain circumstances, I think you understand, where there may only be one witness to a crime. For example, a purse-snatching or a rape. The only two people there might be the person who did it and the victim. The law in the State of Texas allows us to prove a case with only one eyewitness if the jury believes that witness beyond a reasonable doubt as to every element of the offense; in other words, everything in the indictment. Could you listen to one witness, one eyewitness and base a decision on the testimony of one eyewitness?

A If I believed them.

Q Okay. If you don't believe them beyond a reasonable doubt, it's your duty to find the person not guilty because we did the accusing and we've got to do the proving. If you believe a person, one eyewitness, beyond a reasonable doubt, could you convict a defendant based on the testimony of one eyewitness?

A Yes, sir.

Q Okay. Any problem with that at all?

A No.

[2374] Q Now we've talked quite a bit about murder and I mentioned the law in other states. You hear a lot of times on TV or in other states about motive and premeditation in murder. In Texas we don't have to prove to you the motive for a killing. You may hear evidence about it, but you may not and that's not a requirement that we have to prove motive. By the same token, we don't have to prove premeditation for you to convict a person of murder or capital murder. Do you have any problem with that?

A No, sir.

Q Any questions about that?

A No.

Q You obviously are going to hear from witness and you're going to have to base your decision on those witnesses and their testimony. You cannot believe a witness or put extra credibility on a witness just because they're a police officer, for example, or they're a priest or a nurse or whatever it may be. I guess it's kind of like a race, Ms. Nix. Everybody starts out at the same point and as they testify and you hear more about them and **[2375]** you listen to, them, some of them are going to pull ahead and be more believable. Some of them are going to fall back and not be very believable. We need to ask you to start out with all the witnesses at the same point, whether they're police or they're priests or ministers or nurses or doctors or lawyers, whatever it may be, can you start each witness out at the same point and listen to them before making a decision whether to believe what they have to say or not?

A I think I can.

Q In other words, you can't believe someone just because they're a police officer?

A Right.

Q Or-just because they're a minister, you have to listen to what they have to say?

A Yes.

Q Any problem with that?

A No.

Q One last thing; the Grand Jury has returned an indictment in this case alleging capital murder. That indictment is absolutely no evidence of this Defendant's guilt. He is **[2376]** presumed innocent and we have to prove that he's guilty beyond a reasonable doubt and that burden of proof, again, stays right here.

I've done a lot of talking and I haven't given you a chance to say very much. Do you have any questions or anything that we haven't talked about that you feel like we need to talk about?

A No, sir.

Q Okay. Do you feel like I've made myself clear about what we've been talking about?

A Yes.

Q I can't think of anything else we need to talk about. I appreciate very much your patience and your time. I thank you for being open with us and answering the questions. I'm not going to bother you any more. These lawyers over here, I'm sure, will have some questions for you, but again thank you very much.

MR. NELSON: Your Honor, we'll pass the prospective juror.

[2377] EXAMINATION

BY MR. WEST:

Q Ms. Nix, my name is Royce West. Let me ask you this: Do you know any of the participants in this particular trial or know of any of us?

A No, sir.

Q You've never seen any of us before?

A No.

Q Now, again, I'm not arguing with you or anything like that. I want to get to know as much about you as possible within the time that I have in order to adequately represent my client. Okay?

A Okay.

Q All right. Now, I notice that it is Chatta JoAnna Charisse?

A Yes, sir.

Q And your husband's name is Gary C. Jones?

A Yes, sir.

Q Why the difference in names, last names?

A It was just a personal decision.

* * * *

[2379] A Right.

Q What is that?

A It's a general contract construction company.

Q Are you Nix?

A My brother is.

Q Speaking of your brother, you indicated on your data sheet that he was on trial in the I-30?

A They messed up on the indictment and reindicted him yesterday instead of the trial and he made a plea bargain so it's not going to trial.

Is that going to affect you in any manner in this particular case?

A Not that I—

Q I mean, are you going to be concentrating on that?

A No, sir.

Q Are you going to be a potential witness in that case?

A No, sir. It's over for him as far as I know.

Q Were you going to be?

A No, sir.

[2380] Q Have you been interviewed by the U.S. Attorney's office?

A No, sir.

Q Have your brother's attorneys or anything like that?

A No, sir. His attorney—I've also been charged with a conspiracy case on another thing and his attorney is my attorney so I have met him and talked to him and I know him.

Q So you have been indicted?

A I haven't been indicted. I've been—a lawsuit has been filed.

Q Is it criminal or civil?

A It's civil, I'm pretty sure.

Q Who filed it?

A I don't even know. Oh, I do, too, FSLIC filed it against me and thousands of others.

Q Who is your attorney?

A Vincent Perini.

Q Does that grow out of the I-30?

A Yes, sir.

Q And Vincent Perini is also your brother's attorney?

* * * *

[2399] MR. NELSON: Your Honor, the State would be pleased to accept Ms. Nix as a juror in this case.

MR. WEST: Your Honor, we would exercise a strike.

THE COURT: Thank you, Mr. West. Ms. Nix, you will be excused from service in this case. Off the record, Pam.

(Whereupon, there was an off-the-record discussion, after which the following proceedings were held.)

MR. NELSON: Judge, the State would like to put into the record for record purposes that juror number fifty, Vergie Miller, has been excused by agreement and she is, in fact, a black female that has been excused by agreement.

MR. CUNNINGHAM: In response to that, Your Honor, our objections with respect to blacks that have been struck have been

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[2401] Counsel and Mr. Miller-El, I have an agreement between Counsel and the Defendant to excuse jurors Burnett and Sustaita by agreement. I will note those and I'm still, of course, willing to approve those.

MR. CUNNINGHAM: Judge, you should also have one on -- you said Burnett and -

THE COURT: Burnett and Sustaita.

MR. CUNNINGHAM: Also, you should have one on Miller and Mullen.

MR. NELSON: You got those earlier today. I don't know if they've ever been put on the record.

THE COURT: I've got those. The other thing I wanted to get on the record that Counsel has inquired of, actually juror number one, who was number eight on the panel, Ms. Sumrow -- you know, we **[2402]** had a hearing on her condition. The Court has decided to exercise its discretion to excuse her without stating any particular reasons. Of course, I have concern for the jeopardy of this case in the event something should occur to her physically. I would not want this case to be in the position where it could not be completed. Even if we had alternate jurors, I still think that's a problem as well as her own personal needs and the fact that I'm not sure how much attention she could give to this Defendant's

case in view of worrying about her physical condition, so she has been excused. That means we have three sworn jurors.

MR. CUNNINGHAM: On behalf of the Defendant, Thomas Joe Miller-El, we would want the Court to know that we object to the

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[2408] MARY J. WITT,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Witt. How are you doing this morning?

A Fine.

Q Let me begin by reintroducing every one here or most everybody. You may recall that I'm Paul Macaluso and this is Jim Nelson and once the trial itself begins, we'll be joined by another assistant district attorney who is not here now, but his name is Norman Kinne. We are assistant criminal district attorneys here in Dallas and our boss is Henry Wade and is [sic] has designated us to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Ms. Witt?

* * * *

[2412] talking about and there are no right answers, either, unless you say that a right answer would simply be what is honestly on your mind and how you honestly feel. If we ask the right questions and you're open and honest with us, as I'm sure you will be, then you will be doing your job and so will we.

Now, let me explain that no one is going to argue with you or quarrel with you or play lawyer with you and try to talk you into or out of anything. Whatever is on your mind, just let us know, all right. If you have a question, don't hesitate to ask that question. If you have something that you would like to tell us that we don't touch on and you feel that it is important or that we might think it is important, then by all means let us know.

Now, let me tell you where we stand on this case, the State of Texas, Mr. Kinne, Mr. Nelson and myself. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. We make no bones about it, Ms. Witt. We know that the law allows for the death penalty in this type of a case and we intend to be able to provide this jury, once it [2413] is selected, with the type and the quality of evidence that will convince the jury, all twelve of them, beyond any reasonable doubt that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he is charged in this indictment. That's done in the first part of a criminal trial, as you may know.

The second part of the trial where the penalty or punishment is determined, we once again intend to be able to provide the jury with both the type and the quality of evidence that we feel will convince the jury beyond any reasonable doubt that these questions, all of them, should be answered yes which, as you may recall from the remarks of the Judge the other day, results in a mandatory sentence of death for the Defendant. Now, that's our position. Ultimately, of course, it's the position and the decisions made by the jury that controls, but we feel it only fair that we tell you, along with the other fifty or so others that we've talked to, exactly where we stand at the outset of the trial.

Now, with those remarks and those things out of the way, Ms. Witt, like I said [2414] earlier, you're the most important person here this morning and your opinions are the most important. Let me just ask you—although we know you've answered or were given an opportunity to talk about certain things on the questionnaire, now that you've had

three or four days to sleep on it and think about it, let me just ask you if you would share with all of us here your personal feelings on the death penalty and your ability to serve and actually make a decision in a case of this type as a juror?

A I believe in the death penalty depending on the circumstances, of course. But if it's just a love quarrel or somebody has a momentary insanity, then I may not vote for it at that time, It would depend on the circumstances.

Q What you said is consistent with what the law is and we'll talk about it more a little bit later as it concerns a capital murder. You said it depends on the facts and it depends on the circumstances. None of which you've heard to this point; is that correct?

A Correct.

* * * *

[2435] the dynamics, all of the details of an offense? Do you feel you could learn enough about an individual when you learn all the roles that he played in it, a crime of this magnitude, that could tell you beyond a reasonable doubt, yeah, this is the type of person who probably would commit some criminal act of violence in the future? Do you think you could do that?

A Yes.

Q The third question that you see there is a question that you may receive or you may not receive. It depends on the type of evidence. It's conditional. Basically what that asks you to decide is, was this a provoked killing or an unprovoked killing and you would answer it accordingly. Now, let's shift gears here just for a second. I've got precious little time and I've got a couple of important things—other important things. Let me put it that way. I talked to you earlier about the distinction between murder and capital murder. I'm not suggesting that this would ever occur, Ms. Witt, but we have to allow for the possibility and just discuss it with you now.

[2436] Once again suppose that you're on a jury. It's a capital murder that we've alleged in that indictment, a murder during a burglary. That's a type of capital murder. You, along with the other jurors at the conclusion of the trial, are convinced beyond any reasonable doubt that the Defendant committed the murder. You didn't have any doubt about it at all, but you didn't hear any testimony about a burglary or you have a reasonable doubt about it. Do you understand in a situation like that, the State had not met its burden of proof for a capital murder. We didn't prove both components, did we? We proved the murder, but we didn't prove the other component which makes it a capital murder, and that was the burglary. The law is very clear what you have to do then. You have to find the Defendant not guilty of capital murder and find him guilty instead of what we did prove, which was what?

A Murder.

Q Right. If that happens or were to happen, in any case, you just forget about mandatory life or death because those aren't **[2437]** options for murder, as we discussed earlier. The range of penalty for murder is as broad as it is for any offense under the law. I like to think and the other lawyers agree that it's as broad as it is because the law does take into account and allows a juror properly to take into account, in deciding what the penalty ought to be for a murder, the infinite number and variety of circumstances under which one person can knowingly or intentionally cause the death of another that would be legally murder. Do you see what I'm getting at?

A Yes.

Q Now, all the law expects of you to be qualified as a juror on a murder case is really pretty simple. Number one, it is to follow the law in that range of penalty that we'll talk about in just a minute and, most importantly, to keep an open mind, In other words, if you can tell us that, even though you have not heard any evidence in a murder case, you will follow the law with regard to the range of penalty whatever it is. Then once you've heard all the evidence in

the murder case, I mean all of the background, all of the **[2438]** relationships between the parties, the victim and the Defendant, and so forth and so on, then and only then, after keeping an open mind until you've heard all of the evidence, you'll make up your mind on the facts and not before, not prejudge anything, Can you do that?

A Yes.

Q In other words, if you heard a murder case—and no one is going to argue. Murder is bad. Some are worse. If you heard a murder case, after hearing all the facts of the case, that you feel the minimum is called for, warranted and justified—in other words, if the right thing to do is to give the minimum under these facts, after you hear them, you'll give the minimum whatever it is. Can you do that?

A Yes.

Q If you hear a fact situation, on the other hand, that calls for the maximum and you think, under those facts, that the right thing to do, the justified thing, and the proper thing to do after you've heard the evidence, is to give the maximum, you'll give that? Can you do that?

[2439] A Yes.

Q Allowing that the range of penalty for murder is as low as five years in the Texas Department of Corrections all the way on up to ninety-nine years or life and an optional $10,000.00 fine, could you, if the facts and circumstances warranted it in the proper case, consider and actually vote for a sentence of five years for murder, if you thought it was proper?

A Yes.

Q On the other hand, if you thought the case deserved ninety-nine years or life, you could give that as well, and a $10,000.00 fine or anywhere in between?

A Yes.

Q Now, a couple of quick matters here. Remember what the Judge said? Motive and premeditation—he may have said this on Monday and he may have not. Motive and

premeditation are not two requirements of the State in either a murder or a capital murder case. In other words, we don't have to prove, because we may not be able to prove, what motivates one person to kill another or if

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[2471] The lawyers, both sides, thought you looked pretty good, but there are considerations here that I'm satisfied that the case is moving along well enough to allow them to do this.

Off the record, Pam.

(Whereupon, an off-the-record discussion was held.)

THE COURT: It has been agreed that Ms. Salapong and Mr. Doiron will also be excused; is that correct?

MR. MACALUSO: Yes, sir.

MR. CUNNINGHAM: Yes, Your Honor.

(Whereupon, this cause was recessed to Monday, February 24, 1986, at which time the following proceedings were held.)

THE COURT: I would like the record to reflect that we had forty jurors seated according to the order they came up in. The **[2472]** State declined to shuffle and, over their objection, I told the defense they could have a shuffle and that would be the final shuffle. I believe a shuffle was conducted in the Court's office in box and I believe that both defense counsels and one of the prosecutors had an opportunity to shuffle or reorganize, or whatever you want to call it, the jury cards from downstairs and the final order was arrived at. I handed that to the bailiff who is prepared to recall that order. Is that a fair statement of what went on, Mr. Cunningham?

MR. CUNNINGHAM: That's correct.

MR. WEST: That is a true statement.

THE COURT: My clerk was present in my office when all that occurred, although she didn't do anything more than must observe. **[2473]** The list is going to be reseated now

and that will be the final jury list. I believe the State objects not to having another shuffle?

MR. NELSON: Judge, it is the State's position that the law gives each side the right to shuffle and the Court cannot require the State to waive that right prior to the defense exercising their right, necessarily. Based upon that, we'll object to—although we don't know at this point that we would want a shuffle or not, not being given the opportunity—

THE COURT: Good enough.

MR. WEST: Is the record clear that the Court asked the State whether it did want a shuffle and the State indicated that it did not want a shuffle?

THE COURT: The way I've been operating is, to give the **[2474]** State the first opportunity to shuffle and if they accept or object, that's it.

MR. CUNNINGHAM: That's the way it is presented, if the State goes first, then the Defendant and then the State.

(Whereupon, the jury panel was seated in the courtroom and the following proceedings were held.)

THE COURT: Good morning again, ladies and gentlemen. I appreciate your patience with us. The first thing I would like to do—let's see. Sir, on the last row, what is your name?

PANEL MEMBER: Brian Hagler.

THE COURT: What I'm going to do, Mr. Hagler for starters, I'm going to call off the names of some jurors that I'm going to excuse from service in this case. It will be the last row there. You-all may return to the central

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[2518] LETA GIRARD,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon Ms. Girard. As you may remember from this morning, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The lawyer sitting next to me will be back in just a moment. His name is Paul Macaluso and the third gentlemen who will be joining us at the time we actually start evidence in this trial is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas. We've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Mr. E. Brice Cunningham is the gentleman immediately to my left.

MR CUNNINGHAM: How are you, Ms. Girard?

MS. GIRARD: Just fine.

Q And Royce West is next to him.

* * * *

[2520] feelings by not being concerned by what thirty-nine or forty people are thinking about what you're talking about. I know it's difficult with you up here on the witness stand and us out here, but I'd like you to try to relax as much as you can.

Understand that there are no right or wrong answers to anything I'm going to ask you or anyone else is going to ask you. We're just trying to find out how you feel about things. If you will just be as honest and as open as you can—I'll have to ask you some questions that are maybe rather pointed at times and I'm not trying to make you uncomfortable because that's the last thing I want. I'm [sic] don't want to even try to argue with you, but I am going to try to find out bow you feel about some things.

With that introduction, let me just basically tell you what our position is. When I say "we," I mean the three of us representing the State of Texas. We are actively seeking

the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the jurors in this case sufficient **[2521]** type and quantity of evidence to have them convict Thomas Joe Miller-El of the offense of capital murder and also the type and quantity of evidence that will allow a jury to answer those three questions yes, be convinced that those should be answered yes beyond a reasonable doubt. If those three questions are answered yes, Thomas Joe Miller-El receives the death penalty and we anticipate that, if he receives that death penalty, he will be executed at some point.

Now, I tell you that because I feel like it is only fair that you know where we are and what our position is in this thing, but ultimately our position doesn't make that much difference. What counts is the position of you and the other jurors in this case. You filled out that questionnaire this morning. Most people that come down here, if they think about it at all, think maybe I'll be on a civil case or I'll be on a little theft case or something like that and you walk in and sit down and the Judge says this is a capital murder and I guess it would be a little bit of a shock. We asked you to fill these **[2522]** questionnaires out on pretty short notice. There is one question on there about the death penalty. I notice from looking at yours, you didn't answer it. You've had at least a little bit of time to think about it over lunch. Can I just ask you to tell us in your own words how you feel about the death penalty and whether you feel like you could serve on a jury in this type of case?

A Well, I'm really not sure how I feel about the death penalty. The way I feel sometimes is—

MR. CUNNINGHAM: Your Honor, we can't hear.

A To me, living sometimes is a worse—is worse to me than dying would be, so I'm not sure. I'm not saying I couldn't do it, but that's how I feel, I'm just not real sure.

Q Do you feel like the death penalty serves a purpose in our society?

A I'm sure it does.

Q Evidently, from your answers, you've not given this a whole lot of thought before; is that right?

A No.

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[2580] CLARA A. EVANS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

BY MR. MACALUSO:

Q Good afternoon, Ms. Evans. Can you hear me all right?

A Yes.

Q I'll try and keep my voice up and not talk too fast, but if I don't, if I start going too fast, just slow me down, all right?

A Okay.

Q Let me reintroduce myself. I'm Paul Macaluso. This is Jim Nelson and we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade. I'm sure you know that he's the district attorney here in Dallas. We're the lawyers representing the State of Texas in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[2584] A That may be difficult. This is an issue I have avoided, the capital punishment issue.

Q We're going to talk about it in just a little bit here and just tell us how you feel. I've read [sic] your questionnaire and I know how you feel. I've got some idea of how you feel. I know you feel very strongly about that. That's not unusual.

You are juror number fifty-nine. We've talked to many, many people in selecting this jury or trying to select it. We only have three jurors at this time that are qualified. I think you can see that the predominant reason why we only have three jurors out of the significant number that we've talked to is because of the strong feeling that people have one way or the other about the death penalty. That's why the law gives us this added time and this kind of semi-private atmosphere to talk to you about it. We want to know just how you fee.

Now, let me tell you what our position is just in fairness to you, okay?

A Okay.

[2585] Q Now, this is the same thing we've told each and every other juror that we've talked to. Ms. Evans, the State of Texas, the lawyers over here, are actively seeking the death penalty for Thomas Joe Miller-El. We intend to do that throughout the trial. By that I mean, we intend to be able to provide a jury, once it is selected, with the type of evidence and the quality of evidence that will convince them beyond a reasonable doubt that Thomas Joe Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment beyond any reasonable doubt. That's done in the first part of the trial, the decision as to guilt or innocence.

Then in the second part of the trial where the issue of penalty is actually determined by the jury, we once again intend to be able to provide the jury with the type and the quality of evidence that will convince them beyond any reasonable doubt that those three questions should be answered yes which, as you know, results automatically in this Defendant be taking [sic] down to Huntsville, Texas at some point in time, taken down to death row, **[2586]** at sometime designated by the law he will be taken to the death house. They will put him on a gurney bed and take him to the death house and put an IV in his arm and inject him with a lethal substance that will cause his death.

Now, Ms. Evans, I'm not saying that to scare you and I'm not saying that to sound morose. I'm just telling you that in fairness as I've told and the other lawyers have told every juror we've talked to just to bring home the reality of the situation that is at hand here. You know, if you stop to think about it, it's really only being fair to you and all the other jurors. I'm sure this is not something you've been reading about. This is not something you may be talking about philosophically over a cup of coffee or with friends or whatever the case may be. It's not something you've been reading about in the paper or seen on TV. No one wants to put anybody—first of all, no one wants anybody here as a prospective juror such as yourself to be put in a position of compromising any conscientious, religious or moral, strong-felt feelings that you have. Do you see what I'm **[2587]** getting at?

A Uh-huh.

Q All right. That's why we have this opportunity to talk to you as we're doing now. We just want you to know—you know, we know that the law does allow for capital punishment in Texas. Of course, if the jury finds that the evidence proves it beyond a reasonable doubt, then the questions are answered yes. Do you see what I'm getting at? Three yes answers, that's automatically death. Judge McDowell has absolutely no power under the law or otherwise, so far as I know, to override the jury's verdict. Just the same as if one or more of the questions are answered no, that equals a mandatory life sentence. Do you see what I'm getting at?

A Uh-huh.

Q All right. But whether the Judge agrees or disagrees with the jury's verdict, you know, it really doesn't matter because the law does not allow him to override or to replace your verdict as a juror with his own feelings one way or the other.

I notice here in question fifty-**[2588]** six, Ms. Evans—and I'm going to let you do some talking now because the lawyers have heard enough of me. I can guarantee you that.

You obviously are opposed to the death penalty and capital punishment?

A Basically, yes.

Q Let me just ask you if you would share with us in your own words—just tell us how you feel in your own words about the death penalty and capital punishment and then your ability or inability to actually serve on a jury of this type and render a decision that you know would result—in other words, three yes answers would result in the execution of Thomas Joe Miller-El right now there. Just tell us how you feel about that and your ability to actually serve on a jury of this type.

A Well, I think that probably the serving on the jury wouldn't be as difficult as the type of sentence would be. I feel I'm a fairly objective person. I feel I can balance and weigh evidence without emotion, but I do value life. I think probably the only time that I would myself be able to live comfortably **[2589]** after a death penalty that I was responsible for or partially responsible for would be if the prisoner themselves wanted it.

Q Well, that's a situation, I think, in all — being totally realistic about it, it's not going to happen in this case.

A I would assume so, too.

Q Certainly we cannot rely on that.

A Right.

Q I don't think it would be unfair to either side or duly harm or prejudice either side to assume that would not be —

A I would agree.

Q — under any stretch of the imagination the situation or a consideration. Eliminating that one possibility you mentioned, do you feel you could not in good conscience serve on a jury of this type and render a decision of this nature?

A Well, you see I have a question there, too. If everybody on the jury is selected on the basis that they

would impose the death penalty — in other words, there just really isn't too much in the way of an option then, is there? In other words, we don't have

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[2651] JERRY W. MOSLEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Mosley.

A Good morning.

Q I want to start out by reintroducing everybody that's here. Again, my name is Jim Nelson. The gentleman sitting next to me is Mr. Paul Macaluso. As I think you were told yesterday morning, a third lawyer will be involved with us for the State. His name is Norman Kinne. He's not here at the moment. The three of us are all assistant district attorneys here in Dallas. We've been assigned by Henry Wade, our elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Mr. Mosley.

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[2654] as open with us as you can. I may seem like I'm trying to pin you down on some things and I'm going to have to because the law requires me to and I'm not doing that to be rude or give you trouble or make things difficult, but I hope you'll bear with me because I'm doing what the law requires that I do.

With that kind of introduction, let me just tell you what our position is on this case. The State of Texas and those of

us representing the State of Texas are actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel we will be able to present to a jury the type and quality of evidence to, number one, convince them that he's guilty of the offense of capital murder and, secondly, convince twelve jurors to answer those three questions right there on the boards yes. Mr. Mosley, if those three questions are answered yes, Judge McDowell has no option but to sentence Thomas Joe Miller-El to death. He has no option but to sentence him to die by lethal injection down in Huntsville, Texas. Even if he disagrees with what the jury does, if he doesn't personally feel the death penalty **[2655]** ought to be enforced or ought to be given in this case, if the jury answers those three questions yes, that's it. Thomas Joe Miller-El will be put to death at the time designated by law as a result of that verdict. That's what we are planning to do and that's what we anticipate we will be able to do and we anticipate at some point, the life of Thomas Joe Miller-El, that man right down there, will be taken by the State of Texas as a result of this verdict.

Now, you filled out a questionnaire yesterday and I've basically told you our position, but we need to know are your feelings. One of the questions on the questionnaire yesterday, number fifty-six I think it is, asks you what you think about the death penalty, how you feel about it and whether you have feelings for or against it. You answered that question yesterday and were fairly complete in answering it, but I'm going to ask you, since you've had a night to sleep on it—and I would guess, if I were in your position, I would have done quite a bit more thinking about what I was in for in this kind **[2656]** of thing. Would you just tell us in your own words how you feel about the death penalty, number one, and, secondly, about your ability to serve on a jury in this type of case?

A Well, I oppose the death penalty actually myself. I think by taking a man's life for whatever reason, that's not right. I'm not saying that he shouldn't be punished, but that's a big step, you know, to take someone's life.

Q Maybe other punishments would be more appropriate than the death penalty?

A I would say so. I'm not against not punishing a man at all for what he's done, but, you know, taking a man's life, you know, with the facts that we have, you—all have or whatever, we, meaning myself—I don't know whether this man is [sic] actually did it. I don't know what the circumstances were when he done it. I don't know whether it was a case of self-defense. I don't know whether it was just actually, you know, just outright murder or whatever, so it's hard to determine the future or try to determine the future of a person until you get the facts to know what brought

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[2675] to try to stay around and go naturally, you know. I hope everybody else has the same idea in mind, but, you know, as far as just—if that man is executed there, you know, and you knowing that you was one of the twelve that actually had a hand in it, you know, obviously it's going to make you feel something.

Q Right. Right. Well, let me just try to kind of summarize what we've talked about, Mr. Mosley, and you correct me if I say anything wrong or say anything that you don't agree with. Let me ask you one other question. Have you felt this way about the death penalty for quite a long time?

A Yeah, ever since they first passed the deal, the law, whatever it was. You know, I just don't feel like it's just right from the beginning for anybody else to judge a man—take his life and call it legal.

Q Okay. Under any circumstances?

A Under any circumstances.

Q So you've felt this way for a long time and you feel that the death penalty is just not right and you can't have a hand in assessing in executing somebody?

[2676] A That's right.

Q Mr. Mosley, the last thing I want to do and the last thing anybody here should try to do is argue with you and change your mind. I'm not going to try to do that. I guess from what you've told me, even if I tried to, I couldn't. I mean, I could stand here and play lawyer with you and argue with you and switch things all around, but I'm not going to change your feelings about this, am I?

A No.

Q Okay. Those feelings that you've held for a long time, you're not going to change them today; is that right?

A That's right.

Q Well, Mr. Mosley, from what you're saying am I correct that you would refuse to take the oath to serve on his jury then knowing what your job would be; is that right?

A That's right. If I'm going to take the oath as far as the death penalty is concerned, yeah.

Q You understand, by taking that oath, you're saying that if the facts and circumstances justify it, I'll give the death **[2677]** penalty?

A If that's what the oath is about, well then, like I say, I would justly fear that taking the oath is not helping my conscience and it's not helping him.

Q That's fine. There's nothing illegal about not talking that oath. The law says that it is your option as a juror whether you take that oath or not. There's nothing illegal about not taking it. You have told me that you would refuse to take it and I believe you, Mr. Mosley. I'm not going to bother you any more. I'm not going to talk with you any more. I don't see any point in it. You've been very clear in expressing your feelings to me and I appreciate that. I appreciate your talking with me and being patient with me as we've gone through all this stuff. I appreciate your time very much. These lawyers will probably have some questions for you. They won't argue with you or try to change your mind, either.

MR. NELSON: Your Honor, we'll pass the juror and will submit the juror.

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[2738] THE COURT: I understand that. You don't have to change your feelings, but could you still answer those questions knowing what would happen to this man over here?

MR. MOSLEY: I would still have my feelings. I can't live with that.

THE COURT: But could you answer the questions if that's what the law and the evidence told you—

MR. MOSLEY: Yes. To go along with the law, I would do everything I possibly could to—but I wouldn't feel right knowing that I—

THE COURT: What you're saying is this: Regardless of how you feel, you would still base your verdict on what the evidence was and what the law was. That wouldn't change how you feel about the whole thing, but you **[2739]** would do your duty; is that what you're saying?

MR. MOSLEY: Say that again.

THE COURT: Are you saying that regardless of how you feel about it, you would do your duty and it wouldn't change how you feel, but you would do what the law and the evidence told you you had to do?

MR. MOSLEY: Right. I do what the law and the evi ence tells me to do, but it's just hard to change my feelings.

THE COURT: Well, no one is asking you to change your feelings.

MR. MOSLEY: That is what I'm saying. I'm not saying nobody is asking me to do it, but I'm just answering you.

THE COURT: Going back to square one, what I brought you back in here for, you could take that oath to start out with—

[2740] MR. CUNNINGHAM: Your Honor, could you ask Mr. Mosley to step outside?

THE COURT: Let me ask you to go out in the hall for a second while we argue some more law? We're going to get this law question resolved.

(Whereupon, Mr. Mosley left the courtroom, after which the following proceedings were held.)

THE COURT: I'm ready to rule. Have you-all got something?

MR. CUNNINGHAM: Sixty-one for sixty-four.

THE COURT: When is sixty-four coming in?

MR. CUNNINGHAM: A probation officer. I think the Court will agree that's probably—

THE COURT: Yes. Try to get a hold of Ms. Goeters and head her off. Have Mr. Mosley come back in, please.

[2741] (Whereupon, Mr. Mosley returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Mosley, we're going to excuse you from service in this case which means you won't be required to serve on this jury. We appreciate your patience with us this morning and your answers. I think I understood what you were saying very well. I don't think anybody here doubts how you feel, so you have my thanks.

First of all, I apologize, Ms. Williams, for being so late and so long in getting you in. Sometimes it goes very slowly. One of our other jurors took quite a bit of time to talk to. I would like to ask you, as much as possible, to make yourself comfortable and relax. As I said, I've got a

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[2743] DORIS J. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Williams. Let me begin simply by reintroducing everyone here. My name is Paul Macaluso. To my immediate left is Mr. Jim Nelson. Another lawyer who will be joining the State here is Norman Kinne. He's not here, of course, at the moment. The three of us are assistant district attorneys here in Dallas and we work for Henry Wade. We've been designated as the lawyers who will represent the State of Texas in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Williams.

Q I imagine directly, either this morning or when we resume after lunch, he will be joined by Royce West. They are the defense attorneys who were appointed by the Court to

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[2746] talking about and no right answers, either, except true answers. If we ask the right questions and you're as open with us as you can possibly be, we'll be doing our job and so will you. Okay?

Ma'am, if you have a question about anything, by all means ask it. Don't be bashful. If there is something that you need to tell us, whether we get near what it is or whatever, just tell us. It doesn't really matter. You know that no one is going to argue with you or quarrel with you about any personal feelings you have about anything. The whole idea is for all of us to get a grip on how you feel about some of the things that will come into play if you're a juror on this case.

That's simply what we're about here. We're trying to find twelve people to sit over here and to act as jurors in this case. We're looking for the twelve people that we feel would be the most fair and the most impartial and the best suited and qualified to serve on this type of case. That's why we're going through all of this.

Now, let me tell you what our **[2747]** position is in this particular case. Ms. Williams, the State of Texas is actively seeking the death penalty. That is, we are actively seeking

the death penalty in this case for Mr. Thomas Joe Miller-El. We know that the law allows for it. We intend to be able to provide a jury, once it is actually selected, with the type as well as the quality of evidence that would convince them in the first phase of the trial that the Defendant is guilty of capital murder exactly as he is charged in this indictment. I've got a copy right here.

Then in the second phase of the trial, once again, to provide the jury with the type and quality of evidence that would convince them beyond any reasonable doubt that all three questions or all the questions that determine life or death should be answered yes which, as you know, results in an automatic sentence of death. Do you see what I'm getting at?

A Yes.

Q The reason I'm telling you that is just to be fair to you as we've been to all the other jurors that we've talked to, to more or **[2748]** less put them on notice or let them know just exactly what our position is or will be based on the evidence. Everyone has a position, but it's really the position of the jury ultimately that will control and make the decision as to life or as to death. Okay?

A Yes.

Q Now, you were given precious little time yesterday to fill out about sixty or so questions. It asked you everything but your hat size and your IQ, I guess. This saves us a bunch of time because we would have to ask you these questions individually otherwise. You can see how much time that would take.

You were asked about your feelings about the death penalty and capital punishment. Let me just ask you if you could tell us—you've had a day or so to sleep on it and think and reflect a little bit more on it. Let me ask you if you would just share with us in you own words how you feel about the death penalty or capital punishment and your ability to actually serve on a jury of this type and render a decision? In your own words, how do you feel about it?

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[2770] yes. If you decide, on the other hand, that there was some provocation that the victim did or said something, then you decide whether or not the Defendant acted reasonably or unreasonably. Do you see what I'm getting at?

A Yes.

Q. Just summing it up, you could answer those three questions yes or no depending upon the evidence?

A That's right.

Q There would be nothing automatic about it, would there?

A No.

Q Okay. You look to the State just like in the first part of the trial. You would make the State prove to you that those questions should be answered yes; is that correct?

A That's correct.

Q If we don't, then you answer them no?

A Right.

Q Let's shift gears here for just a second. I know I'm going real fast, but we have a lot to cover, all right? Let's imagine **[2771]** again you're sitting on a jury. It's a capital murder case. Let's suppose that in that case the indictment alleges a murder during a burglary. That's a type of capital murder. We would have to prove both the murder as well as the burglary. Let's say you're convinced after hearing all the evidence in the first part of the trial that there was a murder, but let's say you didn't hear any testimony about a burglary or you had a reasonable doubt about the burglary part of it. Do you understand that the State has not met its burden in that example. In other words, if we expect you to find the Defendant guilty of capital murder, we have to prove both the murder and the burglary. We only proved the murder, didn't we?

A Yes.

Q If that were to happen—and I'm not suggesting that it would happen in this case or any other case, for that matter, Ms. Williams, but we need to cover it. The law would expect you under your oath as a juror to find that Defendant not guilty of capital murder because we didn't prove capital murder, did we?

[2772] A No.

Q We proved murder. You found him guilty of what we did prove and that's murder. Remember we said that murder is one level below the offense of capital murder. Now, that is a situation where one person knowingly or intentionally causes the death of another individual. No one is going to quarrel for a moment that any kind of murder is good. They're all bad. It's just that some are worse than others. The law allows you, in a murder case, to take into consideration all of the pertinent and important surrounding circumstances and take those all into consideration basically in allowing you as a juror to tailor the punishment to fit the crime as you decide it once you hear the evidence.

To be a qualified juror on a murder case, basically all we're looking for is the type of juror who can, number one, follow the law. I believe you can follow the law whatever that is; is that correct?

A Yes.

Q Number two, that has an open mind and will not prejudge anything, but will **[2773]** instead say, I'll keep an open mind. I will wait until I've heard the evidence in a murder case, until I've heard all of the facts surrounding a murder and then and only then, after I've heard all of the evidence, if I feel it's proper and warranted and justified to give X number of years, even if it's the minimum, then I'll give the minimum if I feel it's proper to do it. On the other hand, if I hear a fact situation once I've heard the evidence—and, of course, you haven't heard any evidence at all, have you?

A No.

Q But you're the type of person who would keep that oath in mind and will say, I'll wait and listen to the evidence and, if I hear a case that I think calls for, warrants, and justifies the maximum under the law, then I'll give the maximum whatever it is. Any problem with that at all?

A No.

Q Okay. Now, you know that the range of penalty for murder is a sentence of not less than five years in the Texas Department of Corrections all the way up to **[2774]** ninety-nine years or life and even an optional $10,000.00 fine. I gather from what you've told us, because you are the type of person who will follow the law and keep an open mind, if you hear a fact situation that calls for the minimum and you know that the minimum is a five year sentence and you feel that it's proper after you've heard the evidence, you can return a verdict of five years for murder; is that correct?

A Yes.

Q Just like you could return a verdict of ninety-nine years or life if you felt that was proper?

A Yes.

Q I gather, you haven't closed your mind to a five year sentence or a ninety-nine year sentence?

A No, I have not.

Q You will consider the full range of penalty and will wait until you've heard the facts so you can make the decision; is that correct?

A That's correct.

Q All right. Let me just cover one

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[2824] February 26, 1986, at which time the following proceedings were held.)

THE COURT: For record purposes, the lawyers have agreed to excuse juror number sixty-seven, Lourice Collier.

Ms. Sztybel, first of all, I apologize to you for being late. We started late. The lawyers are not at fault. I want you to know that. They were all here. I had some business that I got bogged down in on my regular docket today.

With that in mind, I'm not going to take much more time except to ask you to be as comfortable and relaxed as possible under the circumstances.

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[2825] VIVIAN L. SZTYBEL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sztybel. How are you this morning?

A Fine.

Q I want to start out by reintroducing myself and every one else here. We were introduced on Monday, but that's been a couple of days. My name is Jim Nelson and the gentleman seated next to me is Mr. Paul Macaluso. There is another lawyer who will be involved in this for the State of Texas and his name is Norman Kinne. He will be presenting the evidence. We're all three assistant district attorneys who have been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you

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[2828] bit, I'll talk to you and then these lawyers over here may want to talk to you a little bit also. So here we go.

I feel like it is only fair to you that you know the position of the State of Texas in this case. We have been and are

going to continue to actively seek the death penalty for Thomas Joe Miller-El. That man sitting right down there. We anticipate that we will be able to present to a jury the type and the quality of evidence to convince them, first of all, to find him guilty of the offense of capital murder and, second, to convince them beyond a reasonable doubt to answer those three questions on the board yes. The effect of those three questions being answered yes is that Thomas Joe Miller-El will be assessed the death penalty. There's no option. The Judge can't change the verdict. If those three questions are answered yes, Thomas Joe Miller-El will be taken to Huntsville and we anticipate at a time set by the law, he will be taken to the death house, injected with a lethal substance and he will have his life taken as a result of this verdict.

[2829] That's basically our position. I feel like it is only fair that you know that going in because that's what we're going to be saying from now on throughout this trial. We anticipate we can present that type of evidence. Knowing that, what really counts, I guess, are your feelings and what you think about some things. You had a chance on Monday to fill out a questionnaire.

I would guess that most people come down here thinking, well, maybe I'll serve on a civil case or be on a little shoplifting or purse snatching or something like that. You come in here and sit down and the Judge says, "Guess what, folks. You're on a capital murder case." Right after that he asks you to fill out this questionnaire and you don't have a whole lot of time to think about it. Now that you've had a couple of nights to sleep on it and time to think, I'm going to ask you, if you would, to tell us in your own words, number one, how you feel about the death penalty and, number two, whether you feel like you could serve on a jury in this type of case?

A I'm for the death penalty. I feel

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[2846] well, he really ought to get a life sentence, he doesn't deserve the death sentence, but if we prove to you that each of those questions should be answered yes, then you're required by law to answer those questions yes. Do you have any problem with that?

A No, sir.

Q I guess, the bottom line of what I'm asking you is, can you set your emotions aside and listen to the evidence and answer those questions based on the evidence?

A Yes, sir, I feel like I can.

Q Okay. That's all we ask. You can see how each of those questions could be answered either yes or no depending on what the evidence is. We're going to ask you to keep an open mind until you've heard all the evidence before you make a decision on them. Any problem with that?

A No, sir.

Q Let me switch gears here for just a minute and talk about something that we don't anticipate will happen, but it's something we need to talk about anyway just in case. I told you that we have what we call murder plus to **[2847]** make this a capital murder. Let's say there's a case where it's murder in the course of a burglary, for example. We present our case and we prove to you the murder, the Defendant knowingly or intentionally killed another human being without any legal justification or legal excuse, but you don't hear any evidence at all about a burglary, nothing, all we prove to you is murder. You can't find him guilty of capital murder in that case, can you?

A No, sir.

Q You have to find him guilty of the lesser included offense of murder. As I told you, that's not a death penalty offense in the State of Texas. Murder has the widest range of punishment that the legislature has given any crime, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. There's no death sentence for the offense of murder.

Now, I want to make myself clear about one thing. You mentioned self-defense earlier. If a jury finds self-defense in a murder case, that's not murder. That person is not guilty. If you find that it is an **[2848]** accident, he's not guilty. If you find that he was insane, he's not guilty. If it's killing in the heat of passion—like I have a four-year old daughter. If I saw her one time and she had been abused and the guy that did it was standing two houses down laughing and bragging about it, I would probably lose my cool and go do something to him. Well, that wouldn't be murder because it's what we call killing in the heat of passion. That's voluntary manslaughter, but it's not murder. All of those are legal justifications or legal excuses. When we talk about murder in the State of Texas, we talk about killing someone without any legal justification and without any legal excuse. Am I making myself clear?

A Yes, sir.

Q In order for you to be qualified to serve on a jury, you have to be able to consider the entire range of punishment. Now, when we say "consider", you don't have to be able to sit there right now and say, yes, I'll give him five years or, yes, I'll give him life, yes, I'll give him twenty-three years, or whatever, because you haven't heard the facts. **[2849]** You don't know what the facts are. Would you agree with me, even though it's not self-defense or accident or something like that, there are just all kinds of situations in which a murder can occur, all kinds of facts? If we sat here for hours, we could come up with more and more examples of how a murder could occur. Would you agree with that?

A Yes, I would.

Q Okay. When we say are you able to consider, what that means is, if after you've heard all the evidence, everything you're going to hear, if you believe a life sentence or a ninety—nine year sentence is called for, could you give it?

A Yes.

Q Okay. By the same token, if after you've heard all of the facts and circumstances, you've heard everything

you're going to hear, all the surrounding circumstances, the prior relationship between the parties, the whole thing, if you're convinced in your own mind after hearing all that, that a five year sentence is called for and a five year sentence is justified by those **[2850]** facts and circumstances, could you give it?

A If I've heard all the facts and evidence, yes.

Q You can't tell us right now what you'll do because you don't know the facts and circumstances. All we're asking you is, if you heard the facts and circumstances that justified it, could you give a five year sentence for the offense of murder?

A Yes.

Q I want to emphasize again—and I've said this three or four times—what we're talking about is the killing of another human being without any legal justification or without any legal excuse. All we're asking you to do is keep an open mind and listen to all the evidence and then make a decision based on that evidence. Do you feel like you can do that?

A Yes, sir.

Q Okay. You can give five years in a proper case or you can give life or ninety-nine in a proper case; is that right?

A Yes, sir.

Q Okay. Now, I've used the phrase **[2851]** no legal justification or legal excuse. We're talking about self-defense or accident or that kind of thing, but there may be other circumstances or justifications or excuses that could enter into it like we talked about. There could be hundreds of different situations where it would be murder technically under the law, but there would be all kinds of things enter into it that might cause you to say a five year sentence is appropriate. Would you agree with me about that?

A Yes, sir, I do.

Q There's a couple of other things on murder, while I'm thinking about it. In Texas we don't have to prove to

you motive for a murder. We may. You might hear evidence about it, but we don't have to prove it to you. We also don't have to prove to you that it was premeditated. Although you may hear evidence about that, but we don't have to prove it to you. Would you want us to prove either of those two things or let me put it this way, would you require us to prove either of those things knowing the law does not require us to do that?

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[2913] CHARLES M. SMITH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Smith. Let me quickly begin by reintroducing every one here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q When the trial actually begins, we'll be joined by another lawyer and his name is Norman Kinne. As you may recall from the introductions on Monday, we are assistant criminal district attorneys and we work for Mr. Henry Wade and we've been designated as the lawyers to represent the State in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, sir.

Q And to his immediate left is Mr. Royce West.

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[2916] unclear, by all means stop us and we'll clarify it as best we can. If there is something that you need to add, whether we touch on it or not, by all means just let us know what it is in fairness to both sides, okay?

A Okay.

Q Now, I know you were asked this question on the questionnaire itself, but let me just ask you. Knowing, of course, that this is the type case where the State is actively seeking the death penalty—in other words, we make no bones about it. We know the law allows for it and what we intend to do, of course, during the course of this trial is to provide a jury, once it is selected, with the type and quality of evidence that will convince the jury in the first part of the trial, Mr. Smith, that the Defendant, Thomas Joe Miller-El is guilty of the offense of capital murder exactly as he's charged in this indictment.

In the second part of the trial, we intend to provide a jury with the type and quality of evidence that will convince them, based on the evidence, beyond any reasonable doubt whatsoever that all the questions, **[2917]** whether it be two or three, but all of the questions you receive should be answered in the affirmative which, as you know, automatically results in this Judge, Judge McDowell, mandatorially under the law assessing a sentence of death by lethal injection for Mr. Miller-El.

Now, you understand that's our position. We are actively seeking the death penalty. Ultimately, of course, it's up to the jury to make the final decision and the final determination. I think it is only fair to let you know, as we have the other jurors, exactly what our position is throughout this trial based on the evidence that we intend to provide. Okay?

A Yes.

Q Now, as I said, you were asked this question and really, I guess, it's one of the most significant questions. It's fifty-six, and you were asked how you feel about the death penalty. Let me just ask you if you would share with us, sir, in your own words with all of us how you do feel about the death penalty and then, secondly, is there any reason **[2918]** that you know of why you could not actually serve in a case of this particular type and render a decision that would result in the death of Mr. Miller-El based on the evidence?

A I think, like I wrote down there, I believe that the death penalty probably is the only deterrent that we have against people killing each other. I don't know of any reason why—I don't have any personal reasons why I couldn't, based on the evidence, render a decision.

Q That is, you know of no reason why you could not actually participate in that decision-making process and listen to the evidence and make those decisions?

A No.

Q Now, Mr. Smith, let me just ask you: Obviously, you're in favor of the death penalty for certain types of very serious offenses; is that correct?

A Yes.

Q Have you ever felt differently about it? Has there ever been a time in your life, for example, where you were against the death penalty or just felt differently about it

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[2939] A Yes.

Q Even though you might have a personal desire for a death sentence, if the State doesn't prove to you those questions should be answered yes, you must answer the questions no. Do you see what I'm getting at?

A Yes.

Q The flip side is true, too. You might say, I don't think the guy ought to die. I'd vote for a life sentence, if I could, but in all honesty the State proved yes, yes, yes. Can you do that?

A Yes.

Q Let's shift gears here for a second, Mr. Smith, to something that is very, very important. I'm not suggesting that it would occur in this case, but we need to discuss it at this time. That's a situation where, let's say, you're on a hypothetical jury, you're on a hypothetical capital murder case, and let's say that the State has alleged murder during a burglary, which you know is another type of capital murder, and

you have no doubt, along with the other jurors at the end of the first part of the trial, that the **[2940]** Defendant is guilty of murder. There's no doubt about it, but you didn't hear any testimony about any kind of a burglary or you have a reasonable doubt about it. Well, you know, for us to expect you and the law expects you, to convict someone of capital murder, the State must prove both of those components, the murder and the burglary and we didn't do that, did we, in that example?

A Right.

Q Do you see what I'm getting at? You can't convict that individual of capital murder because we didn't prove capital murder. What did we prove?

A Regular murder.

Q Right. You got it. Now, if that were to happen, then the range of penalty, as I said earlier, is completely and totally different. Let's forget about mandatory life or death. That's just all out the window. It's not even a consideration. We're talking about a murder case. Mr. Smith, to be qualified as a juror on a murder case, regular murder case, all the law expects of you is what I think you already are and that is, number **[2941]** one, to be an open-minded person and expects you, naturally, to follow the law. I gather you're the type of person—you've been in the service and you know that there are certain things that you have to do whether you like them or you don't like them. Would you agree with me?

A Correct.

Q Do you feel that way about the law as well?

A Yes.

Q In other words, there may be some things that you disagree with, but we all do our best, of course, to certainly try to follow the law and I gather you would in that respect, would you not?

A Yes.

Q All right. Well, the law says and the law allows a very, very broad range of penalty for the offense of murder, as I said earlier, to encompass the infinite number of circumstances under which one person could knowingly or intentionally cause the death of another.

While we're on the subject, **[2942]** briefly, the Judge will actually give you definitions of those phrases, knowingly and intentionally. They may be somewhat different from what you commonly think those words mean. A murder is a knowing and intentional killing of another individual. While that would have to be done without any legal excuse or any legal justification such as, like I said, self-defense or accident or insanity or a crime of passion, there could be a myriad of factual or practical, seat-of-the-pants, justifications or reasons that you would be allowed to consider during a murder trial when you learn about the relationship between the parties, the backgrounds of the various individuals and so forth that would tell you that one case deserves X amount and another case deserves XX and so forth and so on. Do you see what I'm getting at?

A Yes.

Q Now, what the law expects, of course, to be qualified as a juror is to just keep an open mind. Do you consider yourself an open-minded individual, Mr. Smith?

A Yes, sir.

[2943] Q That's all they expect of you. You haven't heard any evidence about a murder case, have you?

A No.

Q The law does not expect you to conjure up in your mind a set of circumstances as you sit there now where you would give X number of years or ten X. All the law says is this: I'll follow the law. I'll follow that range of penalty and, if I hear a case that I feel justifies, warrants and calls for, where I feel it's the right thing to do under the facts after I've heard them to give the maximum, I'll give the maximum whatever it is. That's the law. On the other hand, whether I can think of a case now or not, it doesn't matter. If I hear a

case that I feel, after I've heard the facts, calls for and warrants and justifies and I think it's the right thing to do, whether I can think of it now or not, to give the minimum, then I'll give the minimum whatever it is. Any problem with that at all?

A No.

Q What I'm getting at is, the law sets the range of penalty as low as five years **[2944]** in the Texas Department of Corrections all the way up to ninety-nine years or life to allow you as a juror to wait until you've heard all of the evidence, all the backgrounds, all the facts and circumstances, and then you decide whether it should be a five year case, fifteen year case, twenty-five year case, a ninety-nine year or life case. Can you do that?

A Yes.

Q If you heard a case that called for it and, like you say, warranted it and justified it in your mind the minimum, knowing the minimum is five years, do you have any reason why you couldn't assess a penalty of five years in the Texas Department of Corrections for murder?

A No.

Q Bear in mind that it may be difficult for you to give either the minimum or the maximum. It may require some special facts and circumstances before you would say, I'm going to give about five years in the penitentiary for killing somebody, to commit murder, but you will allow that there may be those circumstances out there, will you not?

[2945] A Yes.

Q If you hear them, there's nothing to prevent you from giving five years, is there?

A No.

Q The same thing would hold true for the upper range. It may take some real special facts before you give ninety-nine years or life, but if you see them and you hear them, you'll give ninety-nine years or life, will you not?

A Yes.

Q Now, there's one other matter here. If you're considering the range of penalty for murder, not capital murder, but murder, the law allows you to take into consideration certain—what the Judge would actually instruct you are certain aspects of the parole law. What it just boils down to—and I don't want to muddy the water, but basically what it says is, even though the Judge will give you instructions as to certain things that are taken into consideration in deciding when somebody is eligible for parole, whether it be five years or ninety-nine years

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[2985] LINDA C. BAKER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Baker. As I was introduced to you on Monday, my name is Jim Nelson. I want to reintroduce the other people who will be involved in this trial. Sitting next to me is Paul Macaluso and another person who will be involved in this for the State of Texas is a man by the name of Norman Kinne. Mr. Kinne will present the evidence for us in this case. The three of us are assistant district attorneys here in Dallas and we've been assigned by Mr. Wade to handle this case for the State of Texas.

Next to me is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Baker?

Q Next to him is Mr. Royce West.

MR. WEST: Ms. Baker, good

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[2988] because the law requires me to do that. I'm not naturally nosey or trying to bother you or badger you in any

way, but I need to ask things in a certain way under the law and because we have such a short period of time to find out about these things. I hope you will be patient with me and, if I say anything that you don't understand or if I don't make myself clear or if you have any questions, I hope you will stop me so we can get them cleared up.

With that introduction, let me just start out. I feel like it's only fair, Ms. Baker, that you know what our position is in this case. The position of the State of Texas in this case is that we are actively seeking the death penalty for Thomas Joe Miller-El. We're actively seeking to have him executed. We feel that we will be able to present to a jury, the twelve people, the type and quality of evidence necessary to, first of all, convict him of capital murder and the type and quali[t]y of evidence to, in the second phase of the trial, answer three questions yes. If those three questions are answered yes, Judge McDowell has no option but to sentence that man **[2989]** sitting right down there in the light blue suit to die.

That's what the law says.

If the three questions are answered yes, he gets the death sentence. Ms. Baker, we talk a lot about things in the abstract. I would guess you've had discussions with people about the death penalty and how you feel about the death penalty and you kind of think about it. You hear about somebody being executed and, well, that's fine or that's good or that's bad or whatever, but you're not really involved. You're kind of separated from it. I want you to understand and I think it's only fair that we make it clear to you that now it's real.

If the jury answers those three questions yes, that man right down there in the light blue suit will be taken from here to the penitentiary in Huntsville, Texas and placed on death row. He will stay on death row until the time appointed by law and then he will be taken from his cell on death row and placed in a cell near the death house. On the morning that the law prescribes, he will be taken from that cell near the death house just a few steps away and **[2990]** placed on a gurney. He will be strapped down and he will be

taken into what we call the death house. At that point he will have an IV placed in his arm, in one of his veins. Someone will put a lethal substance in that IV and it will be pumped into his body until the life is gone from him, that man right down there. That's what we anticipate is going to happen, Ms. Baker, if the evidence comes out as we anticipate it will. Again, the reason I say that is so you will understand that we aren't really talking in the abstract anymore. We're talking about here and now and real people and real death.

Now, you had a chance yesterday to fill out a questionnaire—or Monday. Excuse me. You were asked your feelings about the death penalty on that questionnaire. If you would, I'd like you to tell us in your own words, number one, how you feel about the death penalty and, number two, how you feel about your ability to serve on a jury like this where you may have to make this life or death decision?

A First of all, I am not totally in **[2991]** favor of the death penalty. I feel that it has been reinstated because of the overcrowding that we have in the jail situation now. I can't honestly say that I would be able to sentence another human being to death. I just don't think I could live with myself knowing—

MR. CUNNINGHAM: Your Honor, we can't hear.

MS. BAKER: What didn't you hear?

MR. WEST: The last part.

A Okay. I don't think that I could live with myself knowing that I had sentenced someone else to die. I mean, I was not there. I did not witness it. No matter what evidence you may bring before me.

Q Okay. Ms. Baker, I want you to understand one thing and that is no one is going to force you to serve on this jury. If you tell us that you can't do it because of the feelings you just expressed that you couldn't live with yourself, no one is going to force you to serve on this jury. The law requires you to come down here and make yourself available for us to talk and be what we call a

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[3007] never been in this situation before. I have no idea how long it would take me to get over it.

Q Do you still feel like you could take the oath?

A If I were chosen, yes, I could take the oath. I'm not going to say that I would have regrets about it later on, but that is my job as a citizen. Someone has to do it.

Q Let me shift gears here for just a minute and talk about something else that may come up. We don't anticipate that it will, but it might. If we were to prove to you not capital murder but just regular murder, then the death penalty is not an issue any more. At that point the range of punishment is different. Now, when I talk about murder, I'm talking about the knowing or intentional killing of another human being without any legal justification or excuse. In other words, a person know they were going to kill somebody and killed them without—it wasn't self-defense. It wasn't an accident. It wasn't a crime of passion. They weren't insane at the time. They knew what they were doing and they killed somebody knowing that they were going to **[3008]** kill the person. That's murder in the State of Texas.

Now, if you convicted someone of knowingly or intentionally causing the death of another human being, what do you think, just in your own mind personally, should be the minimum sentence that a person should be assessed for killing another human being without any legal justification or legal excuse?

A Knowing that he was going to kill the person and he knew that he was going to do it, I would say life. He's still living, but I think he is a menace to society.

Q Okay. If you were a juror on that type of case, your personal feeling would be to assess a life sentence; is that correct?

A Yes.

Q Could you ever under any facts and circumstances whatsoever assess a sentence as low as say fifteen years?

MR. WEST: Your Honor, I'm going to object at this point in time. Counsel is trying to get Ms. Baker to commit to a particular punishment without **[3009]** giving her the benefit of the full range of punishment, from five years to ninety-nine years or life and a $10,000.00 fine. I would object to Counsel attempting to get Ms. Baker to commit to what sentence should be imposed,

THE COURT: Mr. West, I'm going—

MR. CUNNINGHAM: Your Honor, that is improper in that the question should contain if she believed in her mind that the proper sentence should be fifteen years based upon the facts and circumstances that she had heard in that case.

THE COURT: I'll let Mr. Nelson ask his question his way. I understand that the defense has added some qualifications, but the Court will ask the ultimate question. Go ahead, Mr. Nelson.

Q Did you understand my question, Ms. Baker?

[3010] A Would you repeat it, please?

Q Okay. Could you ever under any circumstances where someone has been convicted of the offense of murder as I've set it out, knowingly or intentionally taking another human life, assess a sentence as low as fifteen or twenty years, for example?

A I think it depends on the circumstances.

Q Okay. You stated earlier that you feel that you would like to see a life sentence because they have taken a life; is that right?

A If they proved it, yes, but there are different degrees no matter what. It could be someone that said, well, I'm going to go here and, if this happens, then I will kill no matter what, but in a sense that is—he's holding up for his own life. It's either kill or be killed and in a way that is self-defense.

Q You understand, if a jury finds self-defense, then a person is not guilty of the offense of murder. It's not murder any more. He's just not guilty.

A Uh-huh.

Q If the jury finds that it was a **[3011]** killing done in passion—for example, if somebody raped my little and I found out who did it and he was standing houses down laughing about it and I went and killed him, that wouldn't be murder. It would be what we call voluntary manslaughter. When we talk about murder, we're talking about the intentional taking of another life without any legal justification any legal excuse whatsoever.

A Do you not agree that someone trained in law procedures can make things—appear as what they want to project them to be?

Q I think there are some people that are capable of doing that, yeah.

A Then it's all in the way that it is presented to you and you have to draw your own conclusions.

Q Right. What I'm asking is—first of all, assume with me, if you will, that you as part of a jury have convicted someone of knowingly or intentionally taking another human life without any legal justification of legal excuse. You convict them of murder. Having done that, could you, under the proper facts **[3012]** and circumstances in your mind, assess a life sentence?

MR. CUNNINGHAM: Your Honor, that is an improper question. If she felt that it was proper based upon the facts and circumstance of that case and she believed that it should be five years—

MR. NELSON: I asked about life.

MR. CUNNINGHAM: Okay.

THE COURT: Go ahead. If that was an objection, I'll overrule it. Go ahead.

Q Could you, under the proper facts and circumstances in your mind give a life sentence for that offense of murder?

A I told you at first, yes, I believe in a life sentence. If you're asking me could I in any circumstance go lower, yes, I could depending on the circumstances.

Q Could you ever go as low as five years?

A I don't know. I can't say.

Q Okay. I told you at first I might **[3013]** have to try to pin you down on some things. The law requires me to do so on this. I'm not trying to be rude and you're answering the same way most people would. Because you aren't there, it's hard to know. But I have to ask you, if you convicted someone of murder, knowingly or intentionally taking another human life, after hearing all the facts and circumstances, everything about the case you're going to know, it's not self-defense and it's not an accident and it's not insanity. It's none of those.

A Can you give me a hypothetical situation?

Q I'm not allowed to under the law. I can't do it. If after you've heard all the facts and circumstances, if you believed in your own mind that the minimum sentence was appropriate, could you give five years for the offense of murder?

A I'm sure that I could.

Q Ms. Baker, my time has run out. In fact two minutes ago my time ran out. I appreciate you being so patient with me and I appreciate your time and the answers to the

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[3017] (Whereupon, an off-the record discussion was held, at which time the State exercised a preemptory strike against Ms. Baker.)

THE COURT: Ms. Baker, I want to thank you for your service down here Monday and again today.

(Whereupon, Ms. Baker left the courtroom, after which the following proceedings were held.)

MR. WEST: Your Honor, may the record, reflect that the prospective juror, Ms. Baker, was in fact a black female. Out of the ten strikes used by the State, the State has used seven of them on blacks.

THE COURT: Mr. Nelson, do you want to reply to that?

MR. NELSON: Yes, Your Honor. The State's reason for exercising a preemptory strike in this particular case had

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[3020] DEBRA S. McDOWELL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. McDowell. You may remember us from way back on Monday. I'm Paul Macaluso and this is Jim Nelson. That's Brice Cunningham and Mr. Royce West is over there on the other side. We are the lawyers, over on this side of the table, that represent the district attorney's office. We're the prosecuting attorneys and we work for Henry Wade and we've been designated to represent the States in this case.

Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is charged with capital murder as I'm sure you know. He's at the very far right. You may be able to see him it you learn forward. He's charged with capital murder, the most serious level of offense under the laws of this state.

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[3023] hesitated. You just tell us whatever is on your mind if you feel it might affect your service as juror on this very important case.

Now, we have five jurors so far in three and a half weeks of selection. We need seven more to begin the trial and you could be number six. We're looking for the people that we feel, both sides feel, are certainly qualified and best suited and who we feel will be the most fair and the most impartial. That's why we need to talk to you and ask you some questions. All right?

Now, let me tell you what our position is so that there is absolutely no mistake about it whatsoever. Ma'am, we are actively seeking the death penalty in this case for this Defendant. Although things have gotten a little bit lighter because we've been doing this for three and a half weeks and we have a sense of humor still, the bold-face reality of the situation if that this is a capital murder case and the State is actively seeking the death penalty. We know that the law allows for it and we intend to provide a jury—and that would mean you if you were on **[3024]** this jury—with the type and quality of evidence that would convince them beyond any reasonable doubt that Mr. Miller-El is guilty exactly as he is charged in this indictment of capital murder. Then in the second part of the trial, again we intend to provide the jury with the type and quality of evidence that convinces them beyond any doubt based on reason whatsoever that those three questions should be answered yes which you know results in mandatory sentence of death.

I just tell you that, as we've told every other person we've talked to, because just out of an abundance of fairness to put on notice of what we intend to prove under the law by the evidence once the trial begins and what the strikes are.

Now, I know you were asked this questions and given precious little time to respond to it really. You've had a couple of more days to think about it and you may want to add something to it or you may not. Let me just ask you how you feel in your own words first about the death penalty itself, capital punishment, and then your ability to actually

[3025] serve on a jury of this type and answer questions that you know would result in the Defendant being executed?

A I feel like, if there was a shadow of a doubt, that it should not be given, but if it is the only thing that would fit the crime, it must be given.

Q You believe in the death penalty, do you not?

A Yes.

Q For very serious types of crimes, I gather?

A Yes.

Q What sort of crimes come to your mind that you feel the death penalty would be proper for? I know it depends on the individual facts, of course, but you know as a category of offenses. You know, we could probably agree that people shouldn't be executed for theft or stealing tires or something like that, but what sort of crimes do you think the death penalty would be warranted depending upon the individual facts and circumstances?

A When there has been an unnecessary

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[3046] said something to provoke the killing, even though it's not going to result in a not guilty verdict, do you understand, then decide whether the Defendant in killing the individual acted reasonably or unreasonably in the light of human experience. Do you see? Which in that case, you answer the question yes or no depending upon how you decide. Do you see what I'm getting at?

A Yes, sir.

Q Is there any reason why you couldn't answer any of these three questions yes or no depending upon the evidence?

A None that I know of.

Q Let's shift gears here for just a second and cover something that is very important. I don't think you would have any trouble with it, but let's just imagine again that you're on a capital murder jury. Let's say it's a capital mur-

der and the indictment alleges a murder during a burglary. Let's say you hear the evidence along with the other jurors and you don't have a doubt in whatsoever based on reason that the murder occurred, but let's say you didn't hear any testimony about **[3047]** the burglary or you have a reasonable doubt. You're not sure the murder occurred during a burglary. You understand, if we charge someone with capital murder of that type and we expect you to convict him of capital murder, we've got to prove both the murder and the burglary, you see, and we didn't do that. See, we didn't prove the burglary. We proved the murder, but didn't prove the burglary. Therefore, we did not prove capital murder. You have to find that defendant not guilty of capital murder because we didn't prove it. Instead you find him guilty of what we did prove, which is what? Murder.

A Yes, sir.

Q If that were to happen—I'm not suggesting it's going to happen in this case. We've alleged a murder during a robbery. If that were to happen, you can just forget about automatic life or automatic death. Those aren't even possible—you know, there's nothing—

A It is just a regular murder then?

Q A regular murder.

A I know what you mean. The **[3048]** punishment would be less.

Q Yes.

A Different?

Q Right. Altogether different. The range of penalty is as broad as any offense under the laws of this State. It's broad because, I think every one will agree—the legislature has set it as broad as it has to encompass the infinite number of circumstances under which murders can be committed. You get to tailor the punishment to fit the crime. In fact, didn't you say something in there about that?

A Yes, the severity of it.

Q Right. You get to listen to the facts and then decide what penalty is actually called for after you and the other jurors have heard all the evidence. All that requires of you to be a qualified juror on a murder case, no capital but murder, is number one—about three things actually. One is that you will follow the law because you believe in the law; is that correct?

A Yes.

Q If the law sets the range of **[3049]** punishment at five years to ninety-nine years or life and an optional $10,000.00 fine, you'll follow that law; am I reading you right?

A Yes, sir.

Q Furthermore, that you have an open mind. You haven't heard any evidence on this case about a murder case, have you?

A No.

Q That's all the law expects. You haven't heard any evidence on which to make that decision yet, so you can't make the decision, can you? All the law expects you to do is follow the law, keep that open mind and tell us that you will keep the open mind until you've heard all of the evidence in a murder case and then after you've heard all of the evidence, if you feel the facts that you hear in that murder case, even though you know it's murder. I mean, murder is murder. But after you've heard all the evidence, if you feel that the facts and circumstances surrounding that murder calls for and warrants and justifies the maximum sentence and you feel it's the right thing to do, the proper thing to do, you would give the maximum which you know is ninety-nine **[3050]** years or life and a $10,000.00 fine? Can you do that?

A Yes.

Q I'm not saying it would be easy. I know you would have to have some special facts to do that. The same thing would hold true for the minimum. You know, it wouldn't be easy to give the minimum. You would have to have special facts, wouldn't you?

A Yes, sir.

Q But after hearing all of the evidence, if you hear a fact situation the calls for, warrants and justifies the minimum and you know that the minimum is five years and you feel it's the right thing, the proper thing, to do, would you vote for a five year sentence, five years in the Texas Department of Corrections for murder?

A Yes, sir.

Q You paused there. I know it sounds—

A Well, I don't know.

Q You would keep an open mind and consider it, wouldn't you?

A Yes, sir.

[3051] Q And if you felt it was proper, you could vote for five years?

A Yes, sir.

Q If you felt it was proper after you heard all of the evidence?

A Yes, sir. If I've heard everything and I know what the law says that we have to decide, I could.

Q In other words, you will tailor the punishment to fit the crime once you've heard all of the facts and you can make a decision. You can't make a decision now, can you?

A No. That's why I hesitated because I don't know until I've heard it.

Q You haven't closed your mind to a five year sentence, have you?

A No, sir.

Q You haven't closed your mind to a ninety-nine year of life sentence, have you?

A No, sir.

Q Let's shift gears here for just a second. Let's talk about something the Judge said the other day. You know the burden of proof, of course, is always on the State to

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[3090] there are no right or wrong answers to anything any of us are going to ask you. We're just trying to find out how you feel about some things. We're going to discuss some law with you and give you and idea of what's to come if you should serve on this jury. We'll just ask you to be as honest with us as you can and be open and bear with us a little bit. The law requires us to be somewhat tedious and somewhat pointed at times, but we're not doing it to be rude. It's just necessary in the context we're in.

A I understand.

Q If you have any questions or anything comes up that I confuse you, which I have a tendency to do, or I get to talking too fast like I do sometimes, stop me and let's make sure we're clear on things before we move on.

I feel like it is only fair, Ms. Willard, to tell you going in what our position is in this case. The State of Texas through Mr. Kinne, Mr. Macaluso and myself is actively seeking the death penalty for that man right down there, Thomas Joe Miller-El. We **[3091]** anticipate we will be able to present to a jury the type and the quantity of evidence to convince a jury to find him guilty of the offense of capital murder and type and quality of evidence to convince a jury to answer three questions yes. If those three questions are answered yes, then the death penalty will be assessed by Judge McDowell. He has absolutely no options in the matter. The jury makes the decision. One the jury render their verdict and the decision is made, he cannot change it.

Our anticipation is that, if those three questions are answered yes, that man sitting right down there will be taken to Huntsville, Texas and on a date set by law will be executed and have his life taken by lethal injection. That's basically our position. Everybody has their position on things, I guess, but the one that really matters right now is yours.

You had a chance on Monday after you tried to get over the shock of finding out this was a capital murder case to fill out a questionnaire. One of the questions on there **[3092]**

was number fifty-six which related to your feelings about the death penalty. You answered it in quite a bit of detail, but you've had a couple of days to sleep on it and think about it. I would like to ask you, if you would, to tell us in your own words how you fell about the death penalty, number one, and whether you feel like you could serve on a jury in this type of case?

A Do you mean do I believe in the—

Q Are you in favor of the death penalty, against the death penalty, do you feel like it serves a purpose?

A May I explain?

Q Sure.

A Well, I feel that—of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thought about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, then I'm not real sure what I – I don't know if I can give you an answer on that or not. I have mixed emotions about that.

[3093] Q Okay. How do you feel about your ability to sit on a jury in this type of a case knowing the weighty issues involved? Do you feel like that is something you're suited to do or you can do? Understand it's not going to be a picnic for anybody.

A No, sir. I don't know if I could. I believe in capital punishment. I don't know if I could be the one to do it, to be on the jury to convict someone. I don't know whether I could or not. It may come to the time that I may have to decide.

Q Okay. Well, let me go into a couple of other things and let's come back to this. Capital murder — in Texas there's murder and then there's capital murder. The only thing the death penalty applies to is capital murder and that's murder under certain special circumstances. For example, if a police officer or a fireman, in the course of their duties, is killed by someone, murdered by someone, that's

capital murder. A mass murder like the incident at Ianni's a year or two ago, mass killing is capital murder. Murder for hire, if I hired Mr. Macaluso to kill someone

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[3157] VIRGINIA M. WEBB,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified and follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms Webb.

A Good morning.

Q Let me begin by reintroducing everybody here. I'm Paul Macaluso and this Jim Nelson. Ma'am, once the trial begins we'll be joined by Norman Kinne. He's not here now, of course. We are all assistant criminal district attorneys and we work for Henry Wade. We've been designated to represent the State in this case.

Now, to Jim's immediate left if Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Webb.

Q I imagine sometime while we're talking he will be joined in the next chair by Mr. Royce West.

A Yes. I saw him on Monday.

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[3161] it or not. Let me tell you also that no one is going to try and quarrel with you and no one is going to try and play lawyer with you too much, I guess, or try and talk you into or out of any position. That's not our responsibility to do that. Just let us know how you feel in all honesty.

Now, let me tell you where we stand in this case. As we've told every other juror at this particular point, we're going to tell you. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. We're making no

bones about it. We know that the law allows for the death penalty in a proper case under the proper circumstances. We fell that once this trial begins—we have six jurors now and we need six more. Once this trial begins we're going to be able to present to this jury both the type and the quality of evidence that will convince them beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he is charged in the indictment.

Then in the second phase of the trial where the actual penalty is determined, [3162] once again we intend to be able to provide the jury with the type of qualify of evidence that will convince them beyond any reasonable doubt whatsoever that those questions should be answered yes beyond a reasonable doubt which, as you know, results automatically in the death penalty and the Judge assessing a sentence of death. Those are the stakes and that's what we're about. Again, as I said earlier, it's only fair to you, as—I've kind of lost count. You're number—

A Seventy-six.

Q The jurors that we've talked to we've let know exactly what out position is from the outset even though ultimately it's up to the jury to make these decisions, but we just want you to know where stand.

Now, I know you were asked this question and it comes down to this, I guess, basically: Question fifty-six asks you—without much preparation you had to answer that question, but how do you feel about the death penalty. Let me just ask you, having been given three or four night to sleep on it and think about it and expand on it, if you have, [3163] if you would just share with us, Ms. Webb, your personal feelings about the death penalty and your ability to actually serve on a case of this type and render a decision that could result in the death of another individual?

A Well, it's a hard decision to make to ever take man's life. I mean, you would have to really feel in your heart that he's guilty and without any doubt, but at the same time, the way our criminal system is listing right now, if I felt a man

was guilty truly and had done something like that, I could sentence him to death because I would rather do that than see him go to jail for seven or ten years and be back on the streets and perhaps kill or whatever somebody else.

Q Okay. I gather from what you said that you feel, if even somewhat reluctantly, the death penalty has a purpose in our society?

A Right.

Q And you do approve of that?

A Yes.

Q In certain situations, for certain individuals who commit certain types of crimes?

A Yes.

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[3185] sentence, if you had that to consider as a juror, put those aside and simply answer the questions and, like some people have said, kind of act like an umpire, and impartial judge of the evidence to decide whether of or not the State has proven beyond a reasonable doubt based on the evidence that the questions should be answered yes. If you do, then answer them yes. If you don't, follow your oath as a juror and answer the questions no. Can you do that?

A Yes.

Q Okay. Let's shift gears here for just a moment and talk about a situation that I'm not suggesting will occur, but we have to discuss it just in an abundance of caution. Hypothetically again imagine that you're on a capital murder jury, not this one, but another one. Let's say the State has alleged—I didn't even tell you earlier the different types of capital murder, but one type of capital murder we're talking about here is a murder where one person knowingly or intentionally causes the death of another individual. Murder is done without any legal excuse or legal justification. Now, there may **[3186]** be myriad of factual excuses of justification that we could take into consideration if you're on a jury,

the relationship between the parties, you know, what led up to this murder—and I can't give you examples. You know as well as I do—we've both lived long enough to know that there are myriad of different reasons, an infinite number of reasons, that could lead up to one person killing another that fall short of a legal excuse. There's no legal excuse for it, but there may be all sorts of human excuses. Do you see what I'm getting at?

A Yes.

Q I'm not going into any justifications, but considerations, let's put it that way. If you commit murder, that's not a capital offense itself. You can't receive the death penalty just for murder in Texas. It must be murder of a policeman, fireman, jail guard, murder for hire and so forth and so on. Those are the categories, murder during the commission of another offense. We've alleged murder during a robbery. Murder during a **[3187]** burglary. Murder during a kidnapping, arson or a burglary.

Now, let's suppose you're on a capital murder jury, but not one like this where we've alleged murder during a robbery, but let's say murder during a burglary. You know, of course, to prove capital murder to you, we have to prove both the murder and the burglary or murder and a robbery, murder and a rape. Do you see what I'm getting at?

A Yes.

Q All right. If we expect you to find him guilty of capital murder—let's say during this hypothetical trial, we prove the murder, but we don't hear any testimony about the burglary, as an example. Do you understand that you couldn't find that Defendant guilty of capital murder under those circumstances simply because we didn't prove capital murder. What did we prove?

A Just that they murdered somebody.

Q Right. So you would have to find them not guilty of capital murder and find then guilty of what we did prove, which was murder. If that were to happen, ma'am, forget all about **[3188]** mandatory death or life. Those are out the win-

window and they're not even a consideration. Under those facts, under a murder case, if you were on a jury, having convicted somebody of murder, the law sets out the broadest of all ranges of penalty under the laws of this state. I think we all agree here that it's as broad as it is to encompass what we talked about earlier, the infinite number of circumstances that you could hear as a juror surrounding the murder of one individual.

Now, bear in mind that we all respect human life and we all know that murder is a bad proposition to begin with, but the law allows you to take into consideration the fact that murders are just worse than others. The law also allows you and expects you as a qualified juror on a murder case to keep an open mind. I get the impression you are an open—minded person. You've already told us you're the type of person who would follow the law and you respect the law.

A Right.

Q It boils down to this, ma'am: The law does allow you to tailor, as the old cliché **[3189]** goes, the punishment to fit the crime once you've heard all of the facts surrounding the murder. Now, bear in mind that murder is, like I said earlier, a situation where one person knowingly or intentionally causes the death of another without any legal excuse or any legal justification. In other words, it's not a situation where someone is killed in self-defense. If you believe that someone acted in self-defense, you have to find them not guilty. Or if someone was insane or it was an accident or a crime of passion, but where someone intended to kill somebody for whatever reason they have. There could be a myriad of different reasons.

Now, all the law says to be a qualified juror that, one you will follow the law and consider that full range of penalty and then wait and keep your mind open until you've heard all of the evidence and then decide what the proper punishment should be, what you feel is proper, based on the facts as you decide them to be. In other words, you haven't closed your mind to the lower range or to the upper range. If you're on that jury and once you've **[3190]** heard all of the

evidence, if you feel it's proper and warranted, justified and just simply the right thing to do to give the minimum, you will give the minimum whatever it is under the law. The same thing would hold true, if you've heard all the facts of a murder case, if you've heard one where you think it's proper, warranted and justified and again simply the right thing to do after you've heard all of the evidence to give the maximum, you'll give that. Can you do that?

A Yes.

Q Even bearing in mind that the minimum, for example, for murder is five years. Bear in mind that you're not expected to sit there and think of a situation now where you would say, well, I can't think of a situation where I would give five years. No one expects you to do that. You're just expected, to be a qualified juror, to be able to tell us, if you see a case that to your way of thinking after you heard the evidence, if the facts call for it and it's five years, I'll give five years even though it may be tough to do to give the minimum. The same thing would hold true for **[3191]** the maximum. If you hear a case that you think calls for ninety-nine years or life, even though it may take special facts, a real aggravated case to do that, you would give ninety-nine years or life?

A Yes.

Q Can you do that?

A Yes.

Q If it's the law, you're going to follow it; is that correct?

A Right.

Q I've just got one or two other matters to cover with you. You understand that the Judge said and, as we said earlier, the State has the burden of proof and the law allows us to prove a case in a variety of ways. As the Judge told you the other day, the law does allow the State to prove a case, even a case of capital murder, with the testimony of one eyewitness if you believe that eyewitness beyond a reasonable doubt. Could you do that, Ms. Webb?

A Yes.

Q Motive and premeditation are two things that the State is not required to prove

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[3246] MR. CUNNINGHAM: Thank you, Ms. Webb. Pass the juror.

THE COURT: What says the State?

MR. MACALUSO: Your Honor, the State would be pleased to accept Ms. Webb as a juror on this case.

MR. CUNNINGHAM: Your Honor, may we approach the bench?

THE COURT: Surely. You can just keep your seat. Sometimes we do things over here that we don't need the reporter for.

(Whereupon, an off-the-record discussion was held between counsel and the Court outside the hearing of the prospective juror.)

THE COURT: Ms. Webb, you will be excused from service in this case. Off the record, Pam. (Whereupon, Ms. Webb left the courtroom, after which the following proceedings

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[3322] LOUIS G. WOLTERS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Wolters. Let me begin briefly by reintroducing everyone here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by another fellow by the name of Norman Kinne. We are assistant criminal district attorneys here in Dallas County and

we work for Henry Wade. We have been designated as the lawyers to represent the State of Texas in this case.

Now, the gentleman to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

MR. WOLTERS: Just fine.

Q To his immediate left is Mr. Royce West. I imagine you recall from Monday that they were introduced to you. They're the

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[3325] yet and I don't think we'll start with you. We just want to know how you feel. It's just that simple. We have our position with regards to this case, but it really doesn't matter. What we're concerned about is how you feel. If you have a question about anything, by all means ask it. Don't be bashful. If there is something you would like to tell us, go ahead and ask it or tell us at any time if you feel it would impact on your service as a juror. Bear in mind that no one is going to try and change your mind.

Now, let me tell you where we stand. The State is actively seeking the death penalty in this case for Mr. Thomas Joe Miller-El. We know that the law allows for it, Mr. Wolters, if the proof is there. We intend simply to provide the jury with the type and quality of evidence in the first part of this trial that will convince this jury, once it's composed, beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he's been charged.

In the second part of the trial, **[3326]** as the law requires, we intend to provide the jury with the type and the qualify of evidence that will convince them beyond a reasonable doubt that the questions the Judge would submit to the jury should all be answered in the affirmative, yes, yes, yes, which you know under the law of Texas results automatically in a sentence of death. Do you see what I'm getting at?

A Yes, I do.

Q The only reason I'm telling you that is because—is just to let you know, as we have let every other prospective juror that we've talked to know, exactly what our position is based on the evidence and provided for by law and what we intend to prove and what our position will be during the course of this trial. As I said earlier, everyone has got their position, as the old saying goes. The position that really counts ultimately will be the position of the jury.

Now, you were given precious little time to fill these questionnaires out, about fifty-nine separate questions. One of them is, of course, about your feelings about **[3327]** the death penalty and whether or not you could serve on this jury. You've had two or three nights to kind of think about it. Let me just ask you before we go any farther, would you just share with us, all of us, your personal feelings about the death penalty, how you feel about capital punishment, and then secondly your ability to serve or not to serve on this type of case and make a decision that could ultimately result in the execution of the Defendant?

A The first part of the question, I believe that the death penalty is necessary in a lot of cases. I believe that society is only as effective as the laws it enforces. Although nobody likes the idea of having to sit in a case like this, if not, then the system won't work.

MR. WEST: Would you speak up some?

A I'm sorry. If nobody wants to sit on this, and nobody does, then the system will not work. It's necessary. It's a duty and I believe everybody has a responsibility to that.

Q In other words, you do—you've

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[3351] A None at all.

Q You would just let the law take it's course without regard to whether it's the death sentence or a life sentence. Fair enough?

A Fair enough.

Q Okay. Let's shift gears here because I'm just about out of time, Mr. Wolters, and I've got a couple of other real important things I would like to cover with you. Let's imagine for a second that Mr. Wolters is sitting on a hypothetical capital murder jury. Let's say it's a murder during a burglary. You're convinced along with the other jurors after the first part of the trial, the first stage, that a murder occurred. You don't have a reasonable doubt about it. No doubt about it at all, but you didn't hear any evidence about the burglary or you had a reasonable doubt about it.

You understand, in a situation like that, the State has to prove both components of the offense of capital murder, the murder and the burglary, if we expect you under your oath as a juror to find someone **[3352]** guilty of capital murder. Am I making myself clear?

A Yes. It's my understanding that this is murder plus, that you have to prove the murder and the plus?

Q And the robbery. We didn't do that in that example, did we? What did we prove? Just murder.

A Just murder, yes.

Q In that case, you find the defendant not guilty of capital murder because we didn't prove capital murder. You find him guilty of what we did prove which was murder. I'm not suggesting that's going to happen in this case or any other case, but it's something we need to discuss. If that were to happen, then you can forget all about—you convict someone of murder, you see, not capital murder, but just murder. The range of penalty is altogether different. Forget about automatic life and forget about automatic death, okay? Instead, the range of penalty for murder is as broad as any offense under the laws of this state, Mr. Wolters.

I like to think, and I think **[3353]** everyone here agrees, that it's as broad as it is to encompass what we talked about earlier and that is the infinite number of situations where one person can commit the offense of murder and all the facts that surround it and make each and every murder a

little bit different and worth of different consideration. Would you agree with me?

A Yes.

Q Like I said earlier, all the law expects of you, as a qualified juror on a murder case, is to, number one—well, it's about three things, really. The first is to follow the law, agree to follow that range of penalty—that's from five years to ninety-nine years or life—and simply tell us that you have an open mind. Obviously you haven't heard any evidence at all, have you? You don't know anything about a murder case to which you could make an intelligent decision?

A Not at this point, no.

Q Just tell us that you're an open-minded person and you will wait. You will listen attentively to all the evidence, all the circumstances, all of the facts surrounding a **[3354]** murder case and after you've heard all of the evidence and then and only then, if you feel that it's proper, warranted, justified and the right thing to do to give the minimum, you will give the minimum whatever it is that the law provides for. The same thing would hold true after you've heard the facts and circumstances of a murder case and you believe that the facts and circumstances warrant, call for, justify and it's the right thing to do and the proper thing to do under those facts, once you've heard them, to give the maximum, you will give the maximum. Can you do that?

A Yes.

Q In other words, no one expects and the law does not expect you to simply right now say, well, I can't think of a case where I would give five years or I can't think of a case where I would give ninety-nine years or life and a $10,000.00 fine. The law does not expect you to be able to think of a case like that, but simply to tell us that, if you see a case and it's a proper case to your way of thinking after you've heard the evidence and you feel it's the right thing to do and the **[3355]** proper thing to do under the law to give five years, you will give five years whether you can think of it now or

not. The same thing if you can think of a ninety-nine year or life case nor or not.

A All right.

Q Am I reading you correctly, Mr. Wolters?

A Yes.

Q Because you're the type of person who is going make a decision based on the evidence and only after you've heard it, right?

A Yes.

Q One of two other matters here and then I'll let the other lawyers talk to you, Sir. Do you understand that the law does put the burden of proof solely on the State and it never shifts over there. He has nothing to prove and nothing to disprove. We have everything to prove. Do you understand that?

A Yes.

Q Mr. Wolters, the law allows a conviction for murder or capital murder on the eyewitness testimony of one individual if you believe that eyewitness beyond a reasonab[illegible]

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[3417] ahead and take care of the other matter. That's semi-urgent, I think; is it not? Ms. Terry, we've got a matter unrelated to this case that Mr. Nelson is involved in and he's going to be the prosecutor who talks to you. If you will bear with us for about five or ten minutes, okay?

(Whereupon, Ms. Terry left the courtroom for a short period of time and then returned to the courtroom and the following proceedings were held.)

THE COURT: I'm sorry to keep you out there in the hall. Ms. Terry, the lawyers have agreed to excuse you in this case. Both sides agreed which I approve because, everything considered, it's probably the best way to handle it. I thank you for your attendance down here today and for your apparent willingness to

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[3433] CHERYL A. DAVIS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Davis. How are you this morning?

A Fine.

Q Good. As I was introduced to you on Monday, my name is Jim Nelson. I'm going to be talking with you for the next few minutes about some things. I want to start out by reintroducing everybody else who is here. The gentleman sitting next to me is Paul Macaluso. As you were told on, Monday, I think, a third person will be involved for the State and his name is Norman Kinne. He will be presenting the evidence for the State of Texas in this case. He's not down here today, but you will see him when the trial starts.

The man seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good [3434] morning, Ms. Davis.

Q He will be joined at some point this morning by Royce West. Mr. Cunningham and Mr. West have been appointed by Judge McDowell to handle the defense for the man at the far end of the table, Thomas Joe Miller-El.

DEFENDANT: Good morning.

Q Thomas Joe Miller-El is charged with and has been indicted with the offense of capital murder, the most serious offense that can be charged in the State of Texas. What we're going to do for the next few minutes is talk to you a little bit about some of the things that may be involved in this case and in the trial itself and some of your feelings about things.

I glanced over your questionnaire. I don't remember you being on jury service before; is that rignt?

A This is my first time.

Q Well, as Royce West is fond of saying, you hit the jackpot. Most people come down here expecting to sit on a civil case or a shoplifting or something like that, but you hit the big time with this one. [3435]

Normally in criminal jury selection you would be seated in a group with forty or fifty people kind of like you were on Monday and the lawyers would talk to you like the Judge did as a group. Because this is such a serious case and there are issues that people feel very strongly about both ways, the law allows us to talk to you individually. The hope is, by talking to you individually, you will feel a little bit more comfortable and it will be a little bit easier for you to talk to us. I know, if I'm in front of a group of forty or fifty people, I'm going to start worrying about how I sound and how I look and if my tie is straight and all kinds of stuff. We just want you here to relax as much as you can and visit with us a little bit. We're going to try to find out how you feel about some things and that's what really counts here today, is your feelings. We want to find the twelve people best suited to serve on this kind of case.

We've been working on this for four weeks. You're juror number eighty-two. We have seven who have been sworn to serve on [3436] the jury at this point. You can see that it is rather tedious and it takes a lot of time and I hope you will be patient with us as we go through it.

Let me just start out by asking you if you know any of us who are sitting here or who are going to be involved in the trial?

A Never seen you before Monday.

Q Okay. I'm going to start out, Ms. Davis,, by telling you what our position is. The State of Texas in this case is actively seeking the death penalty for Thomas Joe Miller-El. We've been telling the jurors that for four weeks now and we're going to continue doing that until the trial is over. We feel like we can present to a jury the type and quality of evidence to convince them beyond a reasonable doubt that

Thomas Joe Miller-El is guilty of capital murder and we feel like we can present sufficient evidence and the quality of evidence to convince you to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice but to assess the death penalty in this case. That's the death penalty for that man **[3437]** sitting right down there.

That's basically our position. I feel like it is only fair that you know that going in because that's what you're going to hear from now on. What really counts is how you feel and your position on things. You had a chance to fill out a questionnaire on Monday. A lot of people have told us that when they got these questionnaires, they hadn't quite gotten over the shock of finding out this was a capital murder case that they were on.

One of the questions, number fifty-six, is about the death penalty and your feelings about the death penalty. I'd like you, if you would, to just tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose in our society or not and, secondly, whether you feel like you could serve on this type of jury, this type of case?

A I've always felt in the past that I wouldn't have any trouble -- you know, I've never been confronted with having to do it before, but I honestly think, if there wasn't a doubt that someone was guilty of murder, I **[3438]** think I could do it. You always say, you know, sure, but I've never been confronted with it. I don't know exactly how to reply. I think I could if there wasn't a reasonable doubt.

Q Can you think of any reason why you couldn't serve?

A I really can't.

Q You put on the questionnaire, do you believe in the death penalty, and you circled yes?

A Yes.

Q Okay. Do you feel like it serves a purpose in our society?

A Certainly.

Q How would you put that? What purpose?

A I know very little about the judicial system, but it seems as though --well, just from what I've read, that people get out of jail for things that they have done and to put them back on the streets, which is always the chance, I don't think it's right. I don't think; if they actually killed somebody and the chances are that they could do it again, they should be released. I really feel **[3439]** an eye for an eye.

Q That's the way some people have put it that have talked to us. How long have you felt this way, Ms. Davis?

A I don't remember. As I say, I've never been confronted with having to discuss it with anybody, but I feel like I've felt this way -

Q You've never been against the death penalty?

A No.

Q You're married; is that right?

A Yes.

Q Do you know how your husband feels about the death penalty?

A I believe he feels the same way. It's not something we've talked about.

4 I understand that it's not something that comes up regularly at the dinner table, but you think he feels about the same way you do?

A Yes.

Q You've said that you feel the death penalty is appropriate for certain types of murder; is that right? **[3440]**

A That's right.

Q Are there any other types of crimes or any other types of cases that you feel the death penalty might be considered if it were up to you?

A I think that murder would be - like rape or anything like that, I don't feel should have the death penalty.

Q Let me tell you a little bit about what the law is in Texas. In Texas there are, I guess, two categories of murder. There's murder and there's capital murder which is murder under certain circumstances, under certain situations. Now, murder, the knowing or intentional taking of another person's, life is not a capital offense. The death penalty is not available, for lack of a better word, for just murder. It has to be capital murder. There are about four categories of capital murder. One of those is killing a certain class of persons like a police officer or a fireman on duty, a prison guard, something like that. The second category is murder for hire. If I hired Mr. Macaluso to kill someone and he did it, we could both be prosecuted for capital **[3441]** murder. The third that is new just this year is mass murder. You may have heard about the Ianni's incident a couple of years ago. That now could be capital murder under the new law. The last kind is the kind that we're dealing with here. We call it murder plus. I think the Judge mentioned that on Monday, murder plus another offense, for example, murder in the course of a burglary or in the course of an arson or a rape or a kidnapping.

What we're dealing with in this case is murder in the course of a robbery. Basically what our indictment that has been returned by the Dallas County Grand Jury says is that Thomas Joe Miller-El did knowingly or intentionally cause the death of Douglas Walker and did it while in the course of committing or attempting to commit a robbery. That's capital murder under the laws of the State of Texas. Do you have any problem with those offenses having the death penalty as an option?

A No.

Q Okay. Would you add to that, add to those offenses or change that in any way?

A I'm not sure that I understand **[3442]** why -- are we talking like someone has premeditated, wanted to murder someone, capital punishment is not?

Q Not necessarily.

A You see, I don't think I fully understand what the difference is. To me that would seem it should have the same charges as a robbery or something like that.

Q The legislature has decided that murder, the knowing or intentional killing of another person, is not subject to the death penalty in Texas. Everybody has their personal

feelings about that. I know laws that I don't agree with. I get out in West Texas and they tell me to drive fifty-five when you can see eighty miles in every direction, I have a little problem with that. In another month and half, I'm going to have a problem with some federal IRS laws also, I think, but I follow the law like everybody does.

Let me just stop right here because I just got the two new names. They're Jacob Hernandez and Homer Hernandez. Do you anybody by either of those names?

A No.

[3443] Q Okay. Back to what I was talking about. Whether I agree with the law or disagree with the law, I follow the law because that's the law. The Texas legislature has decided that capital punishment is not proper for regular murder. It gives a very wide range of punishment for murder. It's anywhere from five years up to ninety-nine years or life and up to a $10,000.00 fine. We'll talk about that some more in a few minutes. But they've given that wide range because there are so many different circumstances in which murder can occur.

When I say murder, I'm talking about the knowing or intentional killing of another human being. We're aren't talking about self-defense. We aren't talking about an accident or someone who was insane or a killing in the heat of passion or something like that. We're talking about killing someone. I think if we sat here for the next four or five hours, we could come up with hundreds of different situations in which murders can occur. It's still murder, but there may be all kinds of things that enter into it.

[3444] People could have been fighting or the prior relationship between the parties you can consider. The circum-

stances surrounding the murder, you can consider. There are all kinds of things that go into that. The legislature has decided that the death penalty is not proper for that. They have restricted it to these specialized categories. What we're going to have to ask you to do is to understand that that is the law and tell us whether you can follow that law or not?

A I think I can.

4 Okay. Even though your personal beliefs are a little bit different. We have people come down here and say, well, for a bad sex abuse of a child case or a bad rape case 'or something I'd like to see the death penalty, but I know what the law is and I could follow the law and there's no problem with that. We have our personal opinions on things, but the legislature has decided this is the way it is and those are the rules we have to abide by. Do you have any problem with that?

A I don't think so. It makes sense.

Q Okay. Now, you talked a little **[3445]** bit about premeditated murder. In Texas we're not required to prove, in a murder case or a capital murder case, either one, premeditation or motive. The law does not require us to prove either one of those things. You may hear evidence on them and we may prove them, but we aren't required to.

Here's basically what we're required to prove, Ms. Davis, and it's this: That Thomas Joe Miller-El on or about a certain date in Dallas County, Texas did knowingly or intentionally cause the death of Douglas Walker, an individual, by shooting him with a firearm and the Defendant did cause the death of Douglas Walker while the Defendant was in the course of committing or attempting to commit the offense of robbery. That's what we have to prove under the law for you to find him guilty of capital murder and that's all we have to prove.

You notice that there is nothing in there about motive. There's nothing in there are premeditation. Now, let me ask you this because we've had this come up before and we've gotten in a little -- premeditation may **[3446]** mean one thing

to me and something different to you. Why don't you tell me what you mean by premeditation?

A Preplanned, that he had the intention of doing this before he left the house, that he left to do this.

Q Okay. Would you require us to prove that to you before you convicted someone of murder or capital murder?

A These are real hard questions. I've never had to even think about anything like this. If it's not a law and you're not required to prove it, I can't see how.

Q Let me go into this a little deeper. We have to prove that the person did this knowingly or intentionally. In other words, it's not an accident. Can you see how someone could decide to do something days or hours ahead of time or someone could decide to kill another person minutes before he does it or someone could even decide to kill another person just moments before he actually does the killing and still intend to kill them or knowingly kill them? Am I making myself clear about that?

[3447] A Yes.

Q Okay. Now, when you talk about premeditation, you're talking that they planned to. do it, you said, before they leave the house. That's fine. If you feel that way, that's fine, but we just need to find out because, if you're going to require that of us, then you're requiring us to do something that the law doesn't require us to do.

A I believe I understand the difference in what you're saying.

Q Okay. Are you going to require us to prove that it was premeditated or, if we show you that it was knowing or intentional, will that be sufficient?

A Yes.

Q Okay. Any question about that?

A No.

Q Now, we were talking a few minutes ago about the range of penalty for murder. I told you it's anywhere from five years up to ninety-nine years or life and a $10,000.00

fine. Again, we're talking about murder, not capital murder.

Say, for example -- in this case we have a murder in the course of a **[3448]** robbery. Let's pick something different. Let's say we have a murder in the course of a burglary.

A I don't know the difference between a burglary and a robbery.

Q Okay. A burglary is if you break into somebody's house and steal something and they aren't there. That's the burglary of a house. We call it burglary of a habitation in Texas. Let's say we have a murder in the course of a burglary. They burglarize the house and kill somebody. We put evidence on and we prove to you that he knowingly or intentionally killed this person, but you don't hear any evidence at all about a burglary, nothing. We haven't proved capital murder then, have we? All we've proved is murder because we haven't proved the plus. Remember that it has to be murder plus?

A Yes.

Q Okay. We haven't proved the plus, so all we've proved to you is murder. That's where the other range of punishment comes in. We talked about murder as the knowing or intentional taking of another human life **[3449]** without any legal justification or without any legal excuse. Again, it's not self-defense. It's not an accident. It's not insanity and it's not a killing in the heat of passion. If I find out somebody raped my four year old daughter and was standing two houses down laughing about it and I went down and killed him, that would be killing in the heat of passion.

It's still a killing, but it's voluntary manslaughter. It's not murder. We're talking about murder. Are we clear on that?

A Yes.

Q The law says that the range of punishment is from five to ninety-nine or life and every juror, to be qualified, has to be able to consider that entire range of punishment. By consider I don't mean you have to tell us right now you will give five years and you don't have to tell us right now that

you will give life or you will give sixty-two years because you haven't heard any of the facts. You don't know what the facts are and we can't tell you at this point what the facts are. We can't even give you examples of facts. **[3450]** All you have to be able to tell me and Mr. Cunningham and the Judge is, you will keep an open mind. You will listen to all the facts and circumstances. You will listen to all the evidence and after you've heard all that evidence, you will make a decision. Do you have any problem with that?

A No.

Q Okay. You have to be able to tell us that, after you've heard all the facts and circumstances, everything you're going to hear about the offense itself, the crime itself, and about the person who committed the crime, if you believe in your own mind that a life sentence is called for would you give it? The other end is, if you believed after you've heard all the facts and circumstances and you know everything about the case and about the defendant that you're ever going to know, if you're convinced in your mind that five years is appropriate for this case, could you give that?

A Yes.

Q You don't even have to be able to sit there right now, Ms. Davis, and say -- and **[3451]** think in your own mind of a case that would justify five years or a case that would justify life. You just have to tell us, if you hear that case maybe sixty years from now, you hear that one in a million case and you say, I never thought I'd hear it, but here it is, a case that calls for five years, you'll give it. I'll give five years. The same thing for the life sentence, I never thought I'd hear it, but this is it. These facts call for a life sentence and I'll give it. Do you have any problem with that?

A No, and I believe I could.

Q You believe, if the facts called for five years, you could give it and, if the facts called for ninety-nine years or life, you could give it?

A I do.

Q Let me mention one other thing while we're talking about it. There's been a law passed by the legislature that you may or may not know about that relates to parole and good time. It basically says it is possible that a defendant sentenced to a term of imprisonment may earn time off his sentence **[3452]** imposed with the aware of good conduct time. It also says that it's possible that the length of time for which a defendant will be in prison might be reduced by the aware of parole. It cannot accurately be predicted how the parole law and good conduct time might be applied to this Defendant if he is sentenced to a term of imprisonment because the application of these laws depend on decisions made by the prison and parole authorities. In other words, you don't know what's going to happen and you don't have any control over what is going to happen. It's up to the Board of Pardons and Paroles and the governor of the State of Texas. You don't have any control. I don't have any control. None of us do.

The law goes on to say, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular Defendant and you are not to consider the manner in which the parole law may be applied in this case. What they do, Ms. Davis, is they tell you that it's there, good conduct time and parole is there, and then they tell you that you can't consider it and you **[3453]** can't adjust the sentence one way or the other because of that. They want you to know it's there, but it can't enter into your deliberations when you're deciding what the punishment is. Do you have any problem with that?

A It would be hard not to have it - I mean, honestly, thinking that if you gave him a certain amount of time and you knew they would get out with good behavior. It would be hard not to consider it, but I can see where -

Q That's where -- when we talked before about what the laws are you know what the laws are -- that's a fire alarm going off.

A Should we leave?

Q If I left every time that thing went off, I would never get any work one. That's another situation where you just have to discipline yourself to say, okay, I know it's there, but I know I can't consider it, so I'm not going to. Again, if you hear that five year case, you will give five years. If you hear the life case, you will give life or sixty years or twenty-five or whatever it is. Do you feel like you can do that? **[3454]**

A I think I could, yes.

Q I understand that all of this is new and you haven't done it before, but I'm sure if you tell us you can do it, you will do it and that's all we ask.

A I feel like I'm an honest person. I don't think that I would -

Q Okay. Good. That's all we're asking. Let me go just a little bit more into capital murder now. I told you what we have to prove in that indictment to prove capital murder. That's done during the first phase of the trial, what we call the guilt or innocence phase. We have to prove that beyond a reasonable doubt. We have to prove it. Mr. Kinne, Mr. Macaluso and myself have to prove it. The defense never has to prove anything. The Defendant sitting right down there right now is presumed to be innocent. If you had to decide on a verdict right now, it would have to be not guilty, not because he didn't do it, but because we haven't proved it yet and it's our duty to prove it beyond a reasonable doubt. They can sit there and we could not hear a peep out of them for the whole trial, but if we **[3455]** don't prove to you everything in that indictment beyond a reasonable doubt, it's your duty to find him not guilty. Do you have any problem with that?

A No. It would have to be proven.

Q Now, part of that is, the Defendant does not have to testify if he doesn't want to. If he chooses not to testify, you can't consider that. You can't discuss it and you can't even think about it. It just flat cannot come up in your jury deliberations. That's another one of those things. It's there, but

you just can't consider it. Do you have any problem with that?

A No.

Q There could be a hundred reasons why he doesn't testify. Someone may have a hair-lip or they may not be able to speak well or they may get tongue-tied when they're in front of people. It doesn't mean they're guilty. They just can't testify for one reason or another.

Now, if he is found guilty of capital murder, we prove our case beyond a reasonable doubt, then we go to what is called **[3456]** the punishment phase of the trial. It is at that stage that the decision either life or death. Those are the only two options for capital murder. It's a life sentence just like any other life sentence in the State of Texas and subject to the same rules and regulations or the death sentence.

Under the old law the jury made that decision directly. They listened to the evidence, go out, and after they decided, write on the jury form either life or death and signed it and that was it. Now, the legislature has made things a little bit different. They ask you to answer questions instead. The three questions on the board are the ones that would be submitted to you. Why don't you take just a minute and read those over.

A (Juror complies.)

Q Have you had a chance to read those?

A Uh-huh.

Q Those three questions are the same in every capital murder case tried in the State of Texas. They aren't unique to this case. **[3457]** The jury is going to have to answer those based on the evidence and we have to prove to you, based on the evidence, that those questions should be answered yes. If we don't, you have to answer them no. Again, you may not hear a peep out of them, but if we don't prove that those three questions should be answered yes, you have to answer them no. Do you have any problem with that?

A No.

Q All right. If you answer all three of them yes, again Judge McDowell must sentence this Defendant to death. He has no options. Whether he agrees or disagrees or thinks that's too strong or too weak or whatever, he has no option but to sentence him to death. The jury makes the decision. By the same token if one of those questions or more than one is answered no, he must sentence the Defendant to a life sentence whether he agrees or disagrees. Even though you're not writing life or death any more, the decision is the . same and the effect is the same. Are you with me on that?

A Uh-huh. **[3458]**

Q Let's look at the questions. The first one is fairly straight forward. "Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" Can you see how, after hearing the facts of this case, of this crime, you could answer that question either yes or not?

A Sure.

Q Okay. If he intended to do it, then that's going to be answered yes. If he didn't, it was an accident or something strange happened where -- like if I shot Mr. Macaluso in the foot and the bullet bounced off the wall and the ceiling and came down and killed him, then that might be answered no. Let's look at number two. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do you feel like they're asking for there?

A He would do it again if he didn't get charged with it.

MR. CUNNINGHAM: I didn't **[3459]** hear the last part.

A If he would do it again if he was not convicted.

MR. CUNNINGHAM: If he was not what?

MS. DAVIS: Convicted.

Q Would you agree with me that probably an important word in that is probability?

A Right.

Q What does probability mean to you, Ms. Davis?

A That there's a chance that it would happen again.

Q Okay. It also talks about criminal acts of violence. Now, that can be murder or it can be other things, too, couldn't it?

A Sure.

Q Like a rape or a robbery, if I took a baseball bat and beat Mr. Macaluso over the head with it, that would be a criminal act of violence, wouldn't it?

A Certainly.

Q So if there is a chance that he **[3460]** would commit a criminal act of violence in the future, then that question would be answered yes. Can you see how that could be answered either yes or no based on the evidence?

A Sure.

Q Is there some important type of evidence that you would like to hear, something you would like to know before you answered that question?

A Right now?

Q After you've heard the case. He's been found guilty of capital murder. What would you like to know to answer that question?

A More about his history. More about prior times.

Q Okay. Can you see how you might be able to answer that from the facts of the case itself; for example, what happened before the crime, was it planned, was he involved in the planning or was it a spur of the moment thing? During the crime was the defendant a leader, was he giving orders or was he kind of on the edge of things? Could he have done something short of killing this person? Afterward did the defendant feel any remorse, **[3461]** did he feel sorry about what happened or was it just another day at the office kind of thing? Do you see how you might be able to answer that question from knowing those facts?

A Certainly.

Q The third question you may or you may not get depending on the evidence. Basically what that asks, Ms. Davis, if it was a provoked killing, if the person who was killed did anything to provoke the killing. If it was an unprovoked killing, that question would be answered yes. Would you agree with me on that?

A Yes.

Q And if he did do something to provoke it, then you're going to have to make a decision, whether the killing was reasonable or unreasonable in response to the provocation, okay?

A Okay.

Q Those are the questions. What we're going to ask you to do is to listen to the evidence and keep an open mind until you've heard all of the evidence and then answer those questions either yes or no based on the **[3462]** evidence. Do you feel like you can do that?

A Uh-huh.

Q If we prove to you that they should be answered yes, then you can answer them yes?

A Yes.

Q If we fail to prove that to you, if we don't carry our burden of proof, you can answer them no; is that right?

A I believe so.

Q You're going to make us prove our case, make us carry our burden?

A Yes. This is important.

Q Okay. Ms. Davis, I'm about out of time. Judge McDowell has been very gracious in giving me an extra couple of minutes for us to talk. Let me mention just about two other things real quickly. The Judge talked to you about one eyewitness on Monday morning. Can you base a verdict on the testimony of only one eyewitness? If you believe that person beyond a reasonable doubt as to everything in the indictment, can you find the Defendant guilty?

A I think so, yes.

Q If you don't believe that person **[3463]** as to everything in the indictment, can you find the Defendant not guilty?

A Yes.

Q A little further on that, the credibility of witnesses. As people testify, I like to put it as kind of a race. Everybody starts out at the starting line, the same point. As people testify and you listen to them, some may pull ahead, some may fall back, some are more believable and some are less believable. You have to start them all out at the same point. You can't believe someone just because they're a police officer or just because they're a minister or a priest. You can't disbelieve someone just because they dig ditches for a living or something like that. Can you listen to everybody and give them the same hearing or the same -- judge them all on the same basis?

A I believe so.

Q And not believe somebody just because they do something or disbelieve them because they do something?

A I believe so.

Q Okay. Ms. Davis, I'm going to **[3464]** quit talking to you. I appreciate your time very much and I appreciate your being open with us. Are you telling us that you will keep an open mind and listen to all of the evidence before you make a decision on the guilty or innocence and do the same thing on the punishment phase?

A Yes.

Q Are you telling us that you can set your personal feelings that don't necessarily agree with the law, set those aside, and follow the law, whatever the Judge tells you to do, you'll do it?

A I believe I can, yes.

Q That's all we're asking. If the Judge tells you that this is the way things are and this is what you have to do, that you can't consider the Defendant's failure to testify and you have to presume him innocent and we have to prove the

case beyond a reasonable doubt, all that stuff, whatever the Judge tells you, you can follow that; is that right?

A Yes.

Q Ms. Davis, I thank you very much for being patient with me in answering my **[3465]** questions. I enjoyed talking with you. Can you think of any reason that you could not be a fair and impartial juror to both sides in this case?

A No, and I have thought about it, too.

MR. NELSON: Judge, we'll pass the juror.

* * * *

[3469] A That I read the book?

Q Yes.

A About a year ago.

Q I believe you told Mr. Nelson the reason that you believe in the death penalty was because people get out of jail and do the same thing again?

A That would have a bearing on it, certainly. I certainly don't know the limitations of the law, but reading the paper, watching TV and that sort of thing. It just seems like a lot of people do bad things and don't have to pay for them. They get right back out and do it again.

Q That's why you believe, if a person kills another person without any legal justification or any legal excuse, that person should receive the death penalty?

A That's one of the reasons, yes.

Q And you would never vote for five years for a knowingly and intentionally taking of another person's life?

A I don't believe I could.

Q You mentioned on your information sheet that your spouse had been charged with **[3470]** theft?

A Yes, sir.

Q Has that case been disposed of?

A He got probation and was off probation in '83.

Q I'm sorry?

A He got seven years probation and it was off in '83.

Q Was that here in Dallas?

A Yes, sir.

Q And you say he completed his probation in 1983?

A Uh-huh.

Q Do you remember whose court that was in?

A Judge Scales?

Q The 195th. You don't hold any grudge against the police or the district attorney's office or anybody else?

A No, sir.

Q You could be fair to both sides?

A I believe so.

Q Mr. Nelson told you, and it is true, that in Texas the State does not have to prove premeditation. They do not have to prove

* * * *

[3503] GARY D. SPENCE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows;

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Spence. Let me begin by reintroducing most of the people who will be involved in this case. I'm Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good afternoon.

Q Mr. Spence, once the trial actually begins, we'll be joined by another lawyer. His name is Norman Kinne and he's not here, of course, right now. Mr. Kinne, Jim Nelson and myself are assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, I'm sure you know. He's designated us as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you Mr. Spence.

* * * *

[3508] enough?

A Fair enough.

Q Okay. Let me tell you what our position is, Mr. Spence, from the very outset, that is the position of the State of Texas relative to this particular case and this Defendant. Mr. Spence, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. Now, we know that the law allows for it under the proper facts. We know what the law is and we know that the law allows for it and we intend to provide this jury—we have seven jurors now and we need five more. We intend to provide this jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt whatsoever that Thomas Joe Miller-El is guilty of the offense of capital murder just exactly as he's charged in this indictment.

Then in the second phase of the trial where the penalty is actually determined, whether it be death or life, we intend to be able to provide that same jury with the type as well as the quality of evidence that will convince them beyond any reasonable doubt whatsoever that [3509] those three questions should be answered yes. You know the result of three yes answers or all yes answers is a mandatory sentence of death. Do you see what I'm getting at?

A You're talking about these questions?

Q Yes, sir. Now, I'm just telling you what our position is just as we've told—you're number eighty-five and we've told every other prospective juror that we've talked to the same thing just to put the juror on notice of exactly what we intend to prove based on the evidence so it will come as no surprise what our position is at the close of the evidence. Do you see what I'm getting at?

A Yes.

Q Now, ultimately what our position is doesn't really matter. Do you understand that? What really matters is the decision that will be made ultimately by people like yourself if you're on this jury. Now, Mr. Spence, what we're looking for, of course, ultimately are the twelve people that both sides feel are the most fair and the most impartial; in other words, the best suited to listen to the facts of this case **[3510]** and make certain, as you can see, very, very, very important decisions. So that's what we want to talk to you about and get your feelings and impressions about.

Now, what we're looking for, of course, is the type of juror who, number one, will follow the law with regard to the law that will come into play in this case and certainly follow their oath as a juror which would require them, as you did in that last case, to render a true verdict according to the law and then according to the evidence. Is there something that you want to say there?

A No, sir. I agree.

Q Now, let me just—I've done quite a little talking here myself and the object of it all is to get you to talk ultimately, to see how you feel about things so we get a little fix on you. Let me just ask you, Mr. Spence: I know you were asked this question, number fifty-six, about how you feel about the death penalty and we only give you three lines there and you weren't given a great deal of time to ponder it. You've had three or four days now to mull it over in your mind. Let me just ask you if you would **[3511]** share with us, sir, your personal feelings about the death penalty and capital punishment. In other words, how do you feel about it and then, secondly, if you feel you would be able to serve on this type of a case and actually render a decision that would result in the execution of another individual?

A I feel that there are crimes that warrant death, sometimes would. As far as being able to serve on this jury, I believe ultimately I feel—I have to tell you up front that it probably wouldn't be an easy thing for me to do.

Q I understand that.

A But I understand that the law provides for such penalties in some cases and I believe in my heart that they're justified in some cases. Yes, I believe I could serve on it.

Q Your feelings about the death penalty, do you feel that the death penalty serves a particular purpose in our society?

A I think it serves two purposes. I believe one, it's a just penalty for some crimes and it shows others, who might be thinking of doing the same thing, what could happen to them.

Q What sorts of crimes comes to your

* * * *

[3525] A Okay. I understand what you're talking about. That's where the—

Q That's where the range of penalty comes in.

A It's not the range of the offense?

Q No.

A It's the range of penalty.

Q Now, the law says for murder, if a person is convicted of murder, the range of penalty is from five years in the penitentiary all the way up to ninety-nine years or life. Like I said earlier, Mr. Spence, all the law requires for you to be a qualified juror on a murder case—we're talking about murder now—is that you, number one, tell us you will be able to follow the law. Can you do that?

A Yes, sir.

Q You followed the law in the rape case, didn't you?

A Yes, I did.

Q All right. The second part of it is, that you will keep an open mind. You will listen to all of the evidence, if you were a juror on a murder case, and wait until you've

[3526] heard every last bit of evidence before you decide what the proper penalty ought to be. Fair enough?

A That's fair enough.

Q Okay. I mean, you're not the type of person, are you, sir, who will prejudge anything before you've heard all the evidence, are you?

A Not knowingly.

Q What I'm getting at is, when you make decisions, certainly important decisions, I gather you, like everybody else, are going to want to hear all of the facts before you make a decision?

A I believe in a case like this, I would want to hear all the facts.

Q And the law expects that a qualified juror will just keep an open mind, wait until you've heard all of the facts. Certainly you've heard no facts about any murder case yet, have you? You've heard no evidence?

A No, sir.

Q All right. Number one, you will follow the law, you will keep an open mind, [3527] isn't that right, and wait until you've heard all of the fact and then decide, after you've heard all the facts in a murder case, what you, Mr. Spence, feel is the proper sentence for the fact situation surrounding this murder. Am I making myself clear?

A Yes.

Q All right. In other words, if you hear a fact situation to your way of thinking, only after you've heard all of the evidence, that you feel calls for the—calls for it or warrants it and justifies the maximum, you will give the maximum, if you feel that's the right thing and the proper thing to do? Fair enough?

A Right.

Q On the other hand, after listening to the evidence in a murder case, wait until you've heard every last stick of evidence, if you feel it is warranted, justified and calls for—in

in other words, it's the right and proper thing to do give the minimum, you will give the minimum? Fair enough?

A Right.

Q In other words, it's like the old cliché, you tailor the punishment to fit the [3528] crime, but you can't tailor any punishment until you hear the facts about the crime, can you?

A No.

Q And you haven't heard anything yet, have you?

A No.

Q Now, there are a couple of important things I want to discuss with you in that regard. As you sit there now, Mr. Spence, the law does not expect you to be able to think in your own mind of a fact situation or, in other words, a murder where you would say, yeah, I could give ninety-years or life and a $10,000.00 fine for this situation that I've got in my mind. Do you see? The law doesn't expect you to think of a situation like that. The law, likewise, does not expect you to be able to sit there and think of a situation where, yeah, I've got a situation in my mind where I could give as low as five years for murder. Do you see? The law doesn't expect you to do that.

All the law requires and expects of you is this, what I said before, to keep an [3529] open mind and don't prejudge anything because you haven't heard any facts yet. Wait until you have heard all of the evidence and then, if you see a case that calls for, warrants and justifies the maximum, you give that. If you see a case to your way of thinking where it is proper to give, under the facts, the minimum, tell us that you would be able to actually consider and vote for the minimum. Can you do that?

A Yes.

Q Now, you understand that it may be difficult to give either the maximum or the minimum. It might take real special facts. Can you agree?

A Yes.

Q In other words, you're going to have to hear something real bad before you give the maximum; would that be fair to say?

A Yes.

Q And you would probably have to hear some real special facts before you would give the minimum. Do you see what I'm getting at?

A Right.

[3530] Q It may be a rare occasion where you would give either the maximum or the minimum. You feel that you ought to set the punishment somewhere in between and the law allows you to do that. If you want to give seven years, ten years, twenty-five years, fifty years, you could give that, too. Do you see what I'm getting at?

A Yes, but I've got one question.

Q Sure.

A Didn't you tell me a while ago there are only two that you could—this particular case has?

Q No. We're just talking about murder. We're not talking about capital murder. We'll talk about that in just a second. When we're talking about murder, it's from five years all the way up to ninety-nine years or life or anywhere in between. Now, what it boils down to is this, Mr. Spence:

Do you feel you're the type of open-minded person who will follow the law and, if you hear a fact situation in a murder case that you feel warrants, justifies and calls for the maximum—and you know that's ninety-nine **[3531]** years or life. If you feel it's proper after you've heard the evidence, could you return a verdict of ninety-nine years or life for murder?

A Yes, I could.

Q All right. Do you see the other side? Are you the type of person who is fair-minded and open-minded and can follow the law and, if you heard a fact situation that, once you've heard all of the evidence, calls for, warrants and justifies the minimum of five years in the Texas Department of

Corrections because you feel it's the right thing and the proper thing to do after you've heard the evidence, could you do that as well?

A Five years doesn't seem right to me for murder.

Q All right. Now, let's cover that for just a second. No one is saying you have to give five years in every murder case. No one is saying you will ever necessarily give five years in a murder case. Mr. Spence, theoretically you could be on a hundred different murder cases and never give one. For example, never hear facts that satisfy you that **[3532]** you should ever give ninety-nine years or life because you just don't ever hear the type of facts that you feel are proper for ninety-nine years or life; would you agree with me?

A I agree.

Q You know, you just may never hear—you may hear some that call for fifty years. You may hear some that call for twenty years and you may hear some that you think call for seventy-five, but you may never hear, if you're on a hundred cases—all you have to do to be qualified is tell us, if you hear a case, whether you can think of it now or not, you're the type of person who is open-minded enough to say, well, I'm not saying what I will do, but if I hear a case that I think calls for life or ninety-nine years and a $10,000.00 fine, I'll give it. I believe you said you could do that; is that right?

A I could do that.

Q They may be few and far between, would you agree with me?

A Yeah, I agree with you. I think I could do that if it warrants it.

Q Right. The same thing would hold **[3533]** true of the minimum. The type of case and the type of facts in a murder that may call for five years may be few and far between, would you agree with me in that regard?

A I think it would be. I can't think of anything right now.

Q That's the whole thing. Don't be thinking of it. All you have to do is to be able to tell us this: If you, that is Mr. Spence, heard a fact situation where you think it's the right thing to do, whether you can think of it now, if you think after you've heard the facts of the case—you say, I never thought I'd see it. I never thought I'd see it, but here they are. These facts, to me, call for the minimum. If the minimum is five years, even though I never thought I'd see it, this is the case, one in a million, one in a hundred, one in fifty—but if you see it and you think it's justified, would you return a sentence of five years?

A If I thought it was justified, I would if that's following the law.

Q That's right and that's all the law is asking. That's all we're asking, that **[3534]** you follow the law and just tell us you have an open mind and you haven't closed your mind, have you?

A No, I haven't.

Q You haven't said—

A No, I haven't done that, but something would have to be justified in my mind.

Q Of course, and so would a ninety-nine year or life sentence, wouldn't it?

A Yes.

Q And a fifty year sentence would have to be justified, too, wouldn't it?

A Right.

Q Or a twenty-five year sentence?

A Yes.

Q In other words, either extreme I think everyone would agree that it would take special facts and you're not going to see them in every case?

A I wouldn't think so.

Q But if you see a five year case, you would vote for five years, wouldn't you?

A If I saw it.

Q You haven't closed your mind to **[3535]** that possibility, have you?

A No.

Q It may be a tough case to warrant five years, but if you see it, you'll give it, won't you?

A If I see it.

Q If you see a case that calls for ninety-nine years or life, you'll give that as well?

A If I see it.

Q Now, while we're on the subject of murder, let's talk about one other thing here. The instructions that the Judge will actually give you to govern your deliberations, he will probably talk to you about the laws of parole. Everyone knows that people are paroled or eligible for parole under certain conditions for any type of an offense sooner or later.

This is kind of an unusual situation, Mr. Spence, but basically what happens here is, the law actually tells you about that any sentence that is assessed in any type of case basically and in a murder case certainly is subject to the law of parole. The Judge would actually give you instructions that

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[3666] MILDRED C. PINCUS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Pincus. As I was introduced to you yesterday, my name is Jim Nelson. The gentleman who is going to be in here in just a minute is Mr. Paul Macaluso and I think the Judge told you yesterday a third person who will be involved for the State of Texas is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas

and we've been assigned by Henry Wade, the elected district attorney, to handle this case for the State.

Seated next to me is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q He will probably be joined at some point by Mr. Royce West. Those two gentlemen are attorneys in Dallas who have been appointed

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[3669] The first thing I would like to ask you is, if you know any of the people in the courtroom or anyone else I've named, either personally or by reputation?

A No, sir.

Q Okay. Ms. Pincus, I feel like it is only fair to you that you understand our position in this trial, the position of the State of Texas. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present to a jury of twelve people the type and the quality of evidence that will allow them to convict him of the offense of capital murder and the type and quality of evidence that will allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice but to sentence that man sitting down at the end of the counsel table to die. That's all there is to it. He has no options. Whether he agrees or disagrees with the jury's verdict, the jury's verdict is the final say.

We anticipate at some point that **[3670]** sentence, if the evidence comes out as we expect it to, will be carried out and Thomas Joe Miller-El will die as a result of the verdict in this case.

Now, you had a chance yesterday to fill out a questionnaire. It was rather lengthy and you didn't have a whole lot of time to think about it and I know you had other things on your mind at the same time. You've had a chance overnight now to think about it a little bit more, so I would like to ask you, if you would, to tell us in your own words how you feel

about the death penalty and secondly how you feel about your ability to sit as a juror on this type of case?

A Well, I've always felt like—there are a lot of instances where I feel like the death penalty is warranted. Not all that are asked for, do I feel like are, but I feel like there are a lot of them that are sitting there on death row right now that should have been executed. I really do because I feel like all the avenues that are available to any of us in that situation have been exhausted. There are some crimes that I really feel very

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[3677] CAROL B. KING,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. King. Let me reintroduce everyone here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne. The three of us are assistant criminal district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas.

To Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q I expect before too long he will be joined by another lawyer who was introduced to you yesterday, a tall man by the name of Royce West. They are the defense attorneys who have been appointed by the Court to represent the man charged with capital murder. He is the Defendant and his name is Thomas Joe Miller-El.

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[3679] want to ask, Ms. King, by all means ask it, all right?

A Okay.

Q Don't be bashful. If there is something you want to tell us, chime in at any time. I don't mean to be corny, but your opinion is the most important opinion. Everyone here has heard me talk for five weeks and they're bored stiff. We want to hear you. All right?

A Fine.

Q We're seeking the death penalty in this case, Ms. King. I just want to let you know as we've let every other juror to this point know. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What that means basically is, we know that the law allows for the death penalty in Texas under certain facts and certain circumstances and we intend, once the trial begins, to provide the jury with the type and quality of evidence that will convince them beyond any reasonable doubt that he's guilty just exactly as he's been charged. That's done in the first part of the trial.

[3680] In the second part of the trial, once again we intend to be able to provide the jury with the type and the quality of evidence that is going to convince them beyond any reasonable doubt that these questions should be answered yes. You know the effect of all yes answers is an automatic sentence of death?

A Yes, sir.

Q Now, everyone has an opinion. We have our opinions based on the evidence, but what is really going to count obviously is your opinion if you're on this jury. Without any further—let me just ask you, Ms. King, would you share with us your personal feelings about the death penalty? How do you personally feel about capital punishment and the death penalty and then secondly, do you know of any reason why you could not serve on a jury of this type and actually render a decision in this case that might result in the execution of Mr. Miller-El?

A Okay. Number one, I am in favor of the availability of the death penalty. I do not know of any reason why I

could not render a decision assuming that the answers are yes.

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[3702] A Yes.

Q You can consider all of the evidence that you used in convicting an individual to decide whether or not these questions should be answered yes and if you do, you answer them yes. It doesn't happen automatically, though. Do you understand that?

A Yes.

Q Could you do that?

A I think so.

Q I forgot to get into something with you. You know that capital murder in Texas is a very, very special type of murder. It's only for capital murder in Texas that you can receive the death penalty. Do you understand that?

A Yes.

Q There is an offense called murder. I'm sure you know that. It's just called murder. It has a very, very broad range of penalty. It's from five years to ninety-nine years or life. The law sets out that range of punishment for murder to encompass the infinite number of circumstances under which one person can commit murder, but you can't receive the **[3703]** death penalty for murder itself.

Now, murder is a situation where one person knowingly or intentionally—there's a legal definition that the Judge will give you for that term, knowingly or intentionally. They may be a little bit different than what you and I ordinarily would think those words mean. If one person knowingly or intentionally causes the death of another individual without any legal excuse or justification, that's murder. Now, there may be thousands of nonlegal justifications or excuses, but it doesn't excuse it because it's not a legal excuse. It doesn't justify it because it's not a legal justification, but you know as well as I do that there may be many factual situations

that mitigate or aggravate a killing, a murder. Do you see what I'm getting at?

A Yes.

Q Now, an example of a legal excuse or legal justification would be self-defense. If you believe someone committed a homicide, that it was in self-defense, that's not murder. If you believe someone killed accidentally or **[3704]** someone was killed accidentally, it's not murder. If you believe someone was insane, it's not murder. If you believe someone acted in the heat of passion, it's not murder.

Now, let me shift gears here for a second. Let's go up to what capital murder is. If you commit murder as I've described it and you commit murder under certain circumstances, then it's possible to get only the death penalty or a life sentence only. You see then, under those circumstances, murder becomes a very, very special type. It must be a murder of a police officer, fireman, jail guard, murder while escaping from a penal institution, murder for hire, mass murder or, as we've set out here, murder in conjunction with another very serious offense such as rape, robbery, burglary, arson or kidnapping.

Let me just ask you, those types of murder that I've set out, killing a police officer and so forth or murder plus, do those strike you generally speaking of the types of offenses that you feel the death penalty should be warranted depending upon the facts and circumstances?

[3705] A Yes.

Q Now, we talked about murder and we talked about capital murder. The Defendant, of course, is charged in this case with murder—we've alleged murder plus, murder during a robbery. I gather from what you said that you believe, depending upon the facts and the background, that's the type of case in which a person should receive the death penalty depending upon the evidence; is that correct?

A Yes.

Q Now, let's shift gears back to what I was talking about, murder. Let's say you're on a jury and let's say that

the State has alleged a capital murder. We've alleged a murder during a rape. That's a type of capital murder. If we expect you as a juror to find that individual guilty of capital murder, we have to prove both the murder and the rape. Do you understand that?

A Right.

Q Let's say you're on that jury and you don't have a doubt whatsoever that the murder occurred, but let's say you don't believe that—you didn't hear any testimony **[3706]** about a rape or you have a reasonable doubt that it was during a rape. Do you understand, if that were the situation, you would have to find that defendant not guilty of capital murder because we didn't prove the rape part of it. You would find him guilty of what we did prove, which is what?

A Murder.

Q Murder. If that were to happen, then you forget all about automatic life or automatic death or capital murder. Do you understand that?

A Yes.

Q I didn't mean to say automatic. I mean mandatory life or mandatory death. Instead you find the defendant guilty of murder and, you know, we have that very, very broad range of penalty. All the law expects of you in a situation like that, Ms. King, is, number one, you follow the law. I believe you said you could do that without a doubt. Whatever the law is, you will follow it. Number two, keep an open mind as to the full range of penalty, in other words not prejudge anything. In other words, sit over there as a juror, if **[3707]** you were on a murder case, and just tell us that you will follow the law you will wait and listen until you hear all of the evidence before you make up your mind on what the proper penalty should be. That's what the law expects of you because, you see, they gave you that very broad range of penalty to allow you to tailor basically, once you've heard all the evidence and all the background information, the relationship between the parties, what you learn about the defendant, what you learn about the victim, their backgrounds,

their relationship, all these things—do you see what I'm getting at?

A Right.

Q Because the law allows you properly to take into consideration—as the old clichéd goes—you've been around a criminal practice—tailor the punishment to fit the crime one you've heard the evidence. So Ms. King is sitting on the jury in a murder case, you know what the law is, five years to ninety-nine years or life and an optional $10,000.00 fine, and you're the type of person who can keep an open mind and wait until you've **[3708]** heard all of the evidence and then, if you decide the right thing to do, the proper thing to do and the just thing to do based on the evidence is to give the maximum, you'll give the maximum after you've heard all the evidence. Can you do that?

A Yes.

Q By the same token—you're the same type of person who will follow the law and you know the range of penalty—if you heard a case to your way of thinking after you've heard all the evidence—and you haven't heard any thus far, have you?

A No.

Q If you hear a case that calls for, warrants, and justifies, and it's the proper and the right thing to do to give the minimum, you will give the minimum whatever it is?

A I can do it.

Q In other words, knowing that the minimum is five years, you could do that?

A Yes.

Q If a proper case calls for ninety-nine years or life and an optional $10,000.00 fine and you think that's the right thing to do **[3709]** based on the evidence and the proper thing to do, can you do that as well?

A Yes.

Q And anywhere in between?

A Yes.

Q Now, you understand that you're not required as you sit there to think of a situation where you would give ninety—nine years or life or imagine a situation where you would give five years. You've just got to be able to say, if I see it, I'm the type of person who will give it. I may not be able to think of it, but I'll give it.

One little thing here I want to talk about briefly is the parole law. This is kind of an unusual situation. Everyone knows that parole exists for any type of crime whether it be murder, burglary, whatever the case may be. The Judge would actually give you an instruction as to the parole law. It's kind of an unusual thing because he would tell you that any sentence you impose is subject to parole and it's subject to consideration of good-time. In other words, a person could be discharged early. He will give you all these

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[3744] CHARLOTTE WHALEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Whaley. As I was introduced to you yesterday, my name is Jim Nelson. The gentleman seated next to me is Paul Macaluso. I think the Judge told you yesterday that there will be a third gentleman involved and his name is Norman Kinne. The three of us are assistant district attorneys here in Dallas who have been assigned by Henry Wade to handle this case for the State of Texas.

The person immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning. How are you?

MS. WHALEY: Fine.

Q Next to him is Mr. Royce West. These two gentlemen are attorneys in Dallas and they have been appointed by Judge McDowell to

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[3747] Q Okay. Ms. Whaley, I'm going to start out by telling you basically what our position is, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We feel we will be able to present to a jury the type and quality of evidence to allow them to convict him of the offense of capital murder. We know the law allows for the death penalty and we intend to present to the jury the type and quality of evidence that will allow them to answer three questions yes. If those three questions are answered yes, then the death penalty is automatically assessed by Judge McDowell. He has no options. He has no discretion in the matter. He must assess the death penalty if those questions are answered yes. That's basically where we are and what we're attempting to do and planning to do.

You filled out a questionnaire yesterday morning which was fairly detailed and you had to do it somewhat of a hurry I would guess under the circumstances. One of those questions, number fifty-six, involved your feelings about the death penalty and you **[3748]** answered that question. I would like to ask you, if you would, now that you've had a chance to sleep on it and think about it some more to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose and, secondly, how you feel about your ability to serve on this type of a jury?

A Well, as you know I circled both yes and No. I suppose I feel that the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.

Q Do you feel then that the death penalty in some circumstances serves a purpose in our society?

A Yes, I do. I think it would keep someone from doing it again, protects society.

Q Do you feel like you're the type of person who can serve on a jury where the death penalty is one of the potential punishments?

A Again, it would depend on the circumstances. I think I could make the

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[3781] there, he is presumed to be innocent. It may be a bad analogy, but you remember the boy and the bubble, so to speak. That's what we're caging in at this point, the presumption of innocence. It's up to them to bust that bubble beyond a reasonable doubt. Okay?

A Right.

Q I want to focus in on these questions. Understand, if a citizen accused of a crime is found guilty of the criminal offense of capital murder, then we go to the second phase of the trial. The State's burden of proof is beyond a reasonable doubt. They have to prove to you beyond a reasonable doubt that the answers to questions one, two and three should be answered yes. If they don't prove it, then the answers should be no.

A Absolutely.

Q Now, I believe your first statement dealing with your response to question number fifty-six, "Do you believe in the death penalty? Please explain your answer.", you circled both yes and no and said, "Depending on the circumstances." When Mr. Nelson asked you about that you indicated that **[3782]** the death penalty should be the last resort. Is that your strong feeling?

A Yes, it is.

Q Okay. If it appears as though a person is capable of rehabilitation, then that should be an option; is that correct?

A Yes.

Q Ms. Whaley, do you have any questions of me?

A No, sir.

Q Have you understood everything that both sides have said?

A Yes, I have.

Q Thank you for being very patient.

MR. WEST: Pass the juror.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: May we have just a moment?

THE COURT: Surely.

MR. NELSON: The State will excuse Ms. Whaley.

THE COURT: Thank you, Mr. Nelson. Ms. Whaley, you will be excused from service. We really

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[3784] CATHERINE C. BARNARD,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Barnard, as I was introduced to you yesterday, my name is Jim Nelson. The rest of these people were introduced to you, but let me go through it again just real quick. Sitting next to me is Paul Macaluso. There will be one other prosecutor involved in this and his name is Norman Kinne. He will be presenting the evidence for the State of Texas. We're all three assistant district attorneys here in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

This is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

Q Sitting next to him is Mr. Royce West.

MR. WEST: Good afternoon,

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[3786] anything. We're just basically trying to find out how you feel about certain issues that may or may not come up in this case. The Judge gave you an idea of what some of those are going to be when we talked yesterday.

I feel, Ms. Barnard, like I ought to tell you right off the bat what our position is. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel that we will be able to present to twelve jurors the type and quality of evidence to allow them to convict him of the offense of capital murder and the type and quality of evidence that will allow them to answer three questions yes. If those three questions are answered yes, he gets the death penalty from Judge McDowell. Judge McDowell has no discretion and no options. The jury makes the decision and Judge McDowell just carries out that decision. That's basically how it works.

You had a chance yesterday to fill out a questionnaire. It was on kind of short notice, but one of the questions on there, number fifty-six, had to do with your feelings [3787] about the death penalty. Now that you've had a chance to sleep on it and think about it a little bit more, would you tell us please, in your own words, what your feelings are about the death penalty and whether it serves a purpose in society?

A I'm not against it. I don't know how to explain to you, but I think I could—

Q Do you feel like the death penalty serves a purpose in our society?

A I think it should.

Q Some people come in here and say, well, it's a deterrent factor. If people know it's there, maybe it will keep them from committing other crimes. Would you believe that might be the case?

A Yes.

Q Okay. Ms. Barnard, you're married; is that right?

A Uh-huh.

Q Would you hazard a guess as to how your husband feels about the death penalty, or do you know?

A I know. He's for it.

Q Now, Ms. Barnard, I want to talk

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[3801] more of those questions could be answered No. You may answer, and may be required to answer them, based on the facts that you heard on the first phase of the trial, but those facts may say to answer them no or they may say answer them yes. We don't know at this point what they're going to say to you, Ms. Barnard, but what we need to know from you is, assuming you've found this person guilty of capital murder, can you still answer those questions either yes or no based on what the evidence shows you?

A Yes.

Q It's not an automatic yes because the defendant has been found guilty and it's not an automatic no because he's been found guilty. You have to look at the evidence. Any problem with that?

A No.

Q Let me talk about one other thing that may come up. We don't anticipate that it will, but it might. We call this murder plus. Let's take a different situation, murder plus a burglary, for example. Say you're a juror on that case and you hear the testimony and the **[3802]** evidence and everybody has rested and closed, but all you've heard about is the murder. We've proved to you that the defendant knowingly or intentionally caused the death of another individual, but we haven't proved anything about a burglary. You didn't hear a word one about a burglary. We haven't proved capital murder, have we? We've just proved murder.

A Yes.

Q That's a lesser included offense of capital murder. Regular murder in the State of Texas does not carry the potential of the death penalty. It has the widest range of punishment of any criminal offense in the state, anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. We talked a few minutes ago about self-defense. Self-defense is a legal justification for killing someone. If you find by a preponderance of the evidence, that it was self-defense, then it's your duty to find that person not guilty. If it was an accident, that person is not guilty of murder. If they were insane at the time, they're not guilty of **[3803]** murder. If it was a killing in the heat of passion—if I came home one day and my little four year old girl had been raped—

MR. CUNNINGHAM: Your Honor, again we will object to giving an actual situation.

THE COURT: I'll overrule in this situation.

MR. CUNNINGHAM: Note our exception.

Q —and the guy that did it was standing two houses down laughing about what he did to my little four year old girl, if I went down there and killed him, the jury might find that was a killing in the heat of passion, but that's not murder. That's voluntary manslaughter which is a different grade of offense with a different range of punishment. When we talk about murder, we talk about the knowing or intentional taking of another human life without any legal justification or without any legal excuse whatsoever. He knew he was going to kill him. He intended to kill him and he killed him without any legal justification or excuse.

[3804] The legislature gave us a wide range of punishment for a reason. Would you agree with me that there is—the word I like to use is—a myriad of circumstances under which murder can occur, those things we talked about a few minutes ago, prior relationship of the parties, actions of the parties. Third parties could be involved. It could be years and years of things building up. It could be a sudden situation. I suppose that, if we sat here the rest of the afternoon and into the evening, we could give you nonstop examples of different situations which would be murder. They are all the knowing or intentional killing of another human being without any legal justification or any legal excuse, but there may

be justification or excuses that don't amount to legal justification or excuses, just like there may be provocation that doesn't amount to self-defense, but it's still something the jury can consider.

In order for you to be qualified to serve on this jury, you have to be able to tell us and tell the defense that you can keep an open mind as to that entire range of **[3805]** punishment. Again, you don't have to be able to sit there right now and say I'll give life, anymore than you have to be able to sit there right now and say I'll give five years, because you don't know the facts. You don't know what the facts are going to show about the case or the people involved or the defendant, for that matter, if anything. We have to know from you that you will keep an open mind and listen to all of the evidence before you make a decision. Can you do that?

A Yes.

Q Okay. You don't have to be able to envision at this point, Ms. Barnard, a case where you would give a life sentence. You don't have to be able to envision a case where you could give a five year sentence. You don't have to be able to envision a case that you would give anything in between. As a matter of fact, the law does not want you trying to think of what would justify a five year sentence or what would justify a life sentence because the law wants you to keep an open mind as to the evidence. But what we do need to know is whether you can consider the entire range of **[3806]** punishment. Now, can consider, I guess, is a phrase, at least in this context, that is a legal type of phrase. It basically means, if you convicted someone of murder, you've heard all the facts and circumstances, everything about the crime, the people involved, the defendant, everything you're going to know, if after you've heard all of that, you feel like the facts and the circumstances call for and justify a sentence of life and a fine of $10,000.00, could you give that?

A Yes.

Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally causing the death of another human being without any legal justification or without any legal excuse. He intended to kill him, knew they were going to kill them, and killed them. It's not capital murder though, it's just murder. You've heard all the facts and circumstances about the case, about the defendant, about the other people involved. If after you've heard all that, you feel in your mind that those facts and circumstances call for and justify a five year sentence for the **[3807]** offense of murder, could you give that?

A Yes.

Q Do you have any problem with that?

A No.

Q Do you feel like you could keep an open mind as to the entire range of punishment?

A I think so.

Q If the facts called for life, you could give life?

A Yes.

Q If they called for five years, you could give five years? If they called for twenty-seven and a half years, you could give twenty-seven and a half years?

A Yes.

Q Any problem with that at all?

A I can't think of any.

Q All we're asking you to do, Ms. Barnard, is just keep an open mind and listen to all of the evidence before you make a decision and do whatever the facts and circumstances justify to you, whatever that may take. It may be one in a million that would call for a life sentence in your mind and maybe there should be one in a million, but if you **[3808]** see that one in a million case, you would give life or if you see the one in a million case that called for five years, you would give five years.

Now, we have people say I can't imagine. There's no way I could ever imagine a case that called for five years and you may think that four years from now, if you're sitting on a jury. I never thought I'd see it, but there it is. If it calls for five years, you give five years.

There is one more thing that enters into that. You probably have heard of parole. The law says and the Judge may instruct you that a person sentence to the Texas Department of Corrections can get credit for what is called good-time against their sentence or they may be paroled early. The law also says that that is under the exclusive jurisdiction of the Board of Pardons and Paroles and the governor. We can't control it. You can't control it and neither can Judge McDowell control it. So knowing all that, the law says, okay, you know this and it exists, but you can't control it so you can't consider

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[3884] argumentative or cross-examining you.

SUSAN K. PAGE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Page. As you may remember from Monday, my name is Jim Nelson. The man seated next to me here is Mr. Paul Macaluso. There will be one other gentleman involved for the State of Texas in this case and his name is Norman Kinne. Mr. Kinne is not here today, but will be when we start representing evidence in this case.

The man immediately to my left is E. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Ms. Page?

Q Sitting next to him is Mr. Royce West.

MR. WEST: Ms. Page, good morning.

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[3886] relax and remember that there are no right or wrong answers to anything anyone is going to ask you and nobody is going to argue with you or try to change your mind. We're just going to try to find out how you feel about these things. This is our fifth week of jury selection and we have eight jurors. It's a little bit tedious and it takes some time and there are some issues that people have very deep feelings about and that's what we're trying to find out. If you will just bear with us and be as open and as honest as you can with us, then that will help us a great deal.

If you have any questions or if I get to talking too fast or if I don't make myself clear, please stop me and we'll get things cleared up because I want to be sure that we understand each other by the time we're finished here.

The position of the State of Texas in this case, Ms. Page, is that we are actively seeking the death penalty for Thomas Joe Miller-El. We know that the law allows for it in this type of case and we believe we can present to a jury the type and the quality of **[3887]** evidence to allow them to convict him of the offense of capital murder and then to allow a jury to answer three questions yes.

If those three questions are answered yes, then Judge McDowell has no choice but to assess the death sentence in this case. He has no options, no discretion in the matter. He must assess the death sentence if all those questions are answered yes. If those questions are answered no, he must assess a life sentence. We'll talk more about that in a few minutes.

That being our position, that doesn't make a whole lot of difference. What counts is your feelings about some things. You had a chance on Monday on rather short notice to fill out a questionnaire. One of the questions on there was about the death penalty and you answered it fairly completely, but you've had a couple of days to sleep on it and think about it. I would like to ask you, if you would, to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose in our society?

A I do believe in the death penalty,

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[3904] A Yes.

Q Let me shift gears just a little bit and talk about something that we don't anticipate will happen in this case, but it's a possibility so I want to talk about it. You remember that we called this murder plus. We have to prove murder plus another offense. Let's say, for example, a murder in the course of a burglary. You're sitting on the jury. We present the evidence and we prove to you the murder part of it. We prove that the defendant knowingly or intentionally caused the death of another human being, but you don't hear a word one about a burglary, no evidence at all that there was a burglary committed at the same time. We haven't proved capital murder at that point then, have we?

A No.

Q We've just proved murder. Murder in the State of Texas does not carry the possibility of the death penalty. It's the broadest range of punishment of any offense in the State of Texas, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00, but death is not an option. You **[3905]** mentioned self-defense before. If a jury finds that it was self-defense, that's not murder. He's not guilty. If a jury finds that it was an accident, it's not murder. He's not guilty. If he's insane, he's not guilty. If it is a killing in the heat of passion—if I came home one night and saw my little four year old girl had been raped and abused and the guy that did it is standing two houses down laughing and telling everybody about it and I take my gun and go down there and blow him away, the jury might find that was a killing in the heat of passion. That's not murder. That's what we call voluntary manslaughter.

When we talk about murder, Ms. Page, we're talking about knowingly or intentionally causing the death of another human being without any legal justification like self-defense or without any legal excuse like insanity. I emphasize legal justification and legal excuse.

I suppose, if we sat here for the rest of the day, that the four of us could give you examples of different types of murders until it got dark tonight and not run out of **[3906]** them. They are probably a myriad of circumstances under which one person could murder another person. As you mentioned yourself, there may be provocations that don't amount to self-defense, but there is still provocation there. There may be a prior relationship between the parties and you could hear about that. Third persons involved, you can hear about that. All the circumstances of a murder case, you can hear about in a murder case.

In order for you to be qualified to serve on a jury, you have to be able to tell us that you can consider the entire range of punishment. When I say consider, I don't mean that you have to tell us right now, yes, I'll give five years or, yes, I'll give ninety-nine years or I'll give forty-three years because you haven't heard the facts. You don't know what the facts are at this point so you can't tell us that. As a matter of fact, you don't even have to be able to envision in your mind a set of facts and circumstances that would cause you to give life or would cause you to give five years. What we need to know from you, Ms. **[3907]** Page, after you've heard all the evidence and all the facts and circumstances, everything you're going to know about the case, about the defendant and everything else involved, after you've heard all of that, if you believe that a life sentence is called for and justified by those facts and circumstances as you heard them, can you give a life sentence?

A Yes, I could.

Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally causing the death of another human being without any legal justification and without any legal excuse, you've heard all the facts and circumstances of the case. You know everything about the murder, about the defendant and everything you're going to know. After you've heard all of that, if you believe a five year sentence is justified by the facts and circumstances, can you give a five year sentence?

A Yes, I could.

Q And you can give anything in between depending on what the facts call for; is that right?

[3908] A Yes, sir.

Q Again, all we're asking you to do, Ms. Page, is keep an open mind as to the entire range of punishment and after you've heard all of the evidence, if you feel five years is justified, give five years. If you feel life is justified, give life. If you think twenty-three point eight seven years is justified, then give that, whatever you feel is appropriate in your mind. You don't even have to be able to sit there right now and think of a set of circumstances that would justify those. As matter of fact, the law doesn't want you to because the law doesn't want you saying what has to be this for me to give five years. They just want you to be able to say, if you hear that five year case, even though it may be one in a million and you may think you'll never hear it, but you're sitting here in twenty years on another murder jury and you say, well, I never thought I'd hear it, but this is the five year case, you'll give five years. Do you feel like you can do that?

A Yes.

Q Even though you've told us how you **[3909]** feel about murder and giving people the death penalty for killing another human being and that kind of thing, you can follow the law; is that right?

A That's right.

Q And if it's murder consider five years up to life and, if it's capital murder, make a decision on those questions all the time based on the evidence; is that right?

A Yes.

Q Any problem with that at all?

A No.

Q Let me mention one other thing while I'm thinking about it. You have probably heard of parole. The Judge may give you an instruction that says a person who is sentenced to the penitentiary may receive good-time credit

based on his conduct in the penitentiary. By the same token, a person may be paroled from the penitentiary before his actual calendar sentence is completed, but the law goes on to say that you can't concern yourself with that because that is in the exclusive jurisdiction of the Board of Pardons and Paroles and the governor. You can't

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[3942] JANICE MACKEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Let me begin by reintroducing most everyone that will be involved directly in this case. As you may recall, I'm Paul Macaluso. This is Jim Nelson and we will be joined by another lawyer whose name is Norman Kinne. He's not here now. We're all assistant district attorneys and we work for the DA's office in Dallas and we've been designated as the lawyers to represent the State in this case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Mackey.

Q Momentarily, he will be joined by Mr. Royce West. They're the defense attorneys, I'm sure you recall, who were introduced the other day along with us. They are the lawyers

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[3946] other words. You just tell us how you honestly feel and, like I said, you will be doing your job. Furthermore, Ms. Mackey, if you have a question about anything, okay, don't be bashful, ask the question. If there is something that you need to tell us that we don't touch on, that you feel is

important, then by all means, in fairness to everybody, just let us know.

Let me tell you what our position is in this particular case, that is the State of Texas. Ms. Mackey, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. We know that the law allows for it. The Judge told you that. The law does allow a person convicted of capital murder to receive potentially the death penalty. We are actively seeking it. What it boils down to is this: We intend to provide a jury with the type and quality of evidence at the end of the trial that will cause them, under the law, to find the Defendant guilty of capital murder just exactly as he is charged in this indictment. That's the first step and that's done in the first part of the trial.

[3947] Then in the second part of the trial, we intend to provide that jury with the same type and quality of evidence that will convince them beyond any reasonable doubt that the questions that the Judge would submit to you should be answered yes beyond any reasonable doubt, which will automatically result in Judge McDowell sentencing Thomas Joe Miller-El to be executed. What that means is in the legal process of things, after the pronouncement of sentence by Judge McDowell, the Defendant, after legal processes have been continued, would be taken down to the Texas Department of Corrections. He will be placed on death row and at such a time as designated by law, he would be taken to, what we call, the death house and at a particular time he would be placed on a gurney—do you know what a gurney is?

A Yes.

Q He would be taken to the death house and have what basically amounts to a needle inserted into his arm and then, under the law, a lethal substance, in other words a poisonous substance, would be placed in his **[3948]** body. Enough of it would be placed in there to cause his death. In other words, I don't mean to be gory about this thing and I don't mean to try and frighten you, but I just want to bring home the seriousness of what we're about here and what

we're ultimately trying to do under the law. We're trying to kill Thomas Joe Miller-El under the law. The law provides for it. That's what we're about here.

Now, I know that it might sound a little bit gory, but the reason I'm saying that is because we want you to have an accurate picture. We want all the jurors to have an accurate picture of just what the consequences are of this particular type of a trial. Now, as you well know—or as you may know—we are in our fifth week of jury selection. We have at this time eight jurors. You are prospective juror number one hundred, so you can see how laborious this process is and how long it takes. The whole idea of it all, as I said earlier, is to find out how you think and how you feel. Now, I'm doing all the talking right now, out you can see that this type of a case where it involves the death penalty, **[3949]** people have strong feelings, obviously, one way or the other. Do you see what I'm getting at?

A Yes.

Q We want to know how you feel about it ultimately and I'm going to stop talking here in just a minute and let you tell us how you feel personally about the death penalty, for one, and capital punishment and then secondly, your ability to actually serve on this type of a jury or to not serve. You've been asked this question, number fifty-six, and you said "Thou shall not kill"; is that correct?

A That's correct.

Q That's the way you felt Monday when you came down here?

A Yes.

Q Is that the way you feel now?

A Yes.

Q Just tell us a little bit more, kind of in your own words, how you feel about the death penalty.

A Well, I don't believe a person has the right to say who should be killed and who shouldn't going by what the crime is. Like I

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[4022] follow the law. She's not an ideal juror from the State's standpoint. I'm aware of that, but I'm going to hold that she is qualified.

Based on that, what is your pleasure?

THE COURT: Whatever we do, I'm not going to start until—I'm going to recess until about 12:30. Why don't you send the next juror to lunch, Bob?

MR. NELSON: We would like to put it on the record with the Court's permission that we are exercising a challenge because of what's been the subject of discussion with the Court for the last fifteen or twenty minutes, her reservations about the death penalty and her statements that she can't serve on this kind of jury and doesn't want any part of it and cannot give the death penalty or be part of anyone being

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[4028] BRENDA G. WALSH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Walsh. As you may remember, my name is Jim Nelson and I'm an assistant district attorney here in Dallas. Sitting next to me is Mr. Paul Macaluso. There will be one other gentleman involved for the State in this case and his name is Norman Kinne. He will be presenting the evidence for the State of Texas. The three of us are assistant district attorneys who have been assigned by Henry Wade to handle this case for the State of Texas.

To my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Walsh?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Ms. Walsh.

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[4039] might have.

Let me just start out by telling you what our position is in this case. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El. We know that the law allows for it and we feel like we will be able to present to a jury sufficient evidence to allow you to convict him of the offense of capital murder. We feel we will be able to present the type and quality of evidence that will allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has no choice under the law but to sentence that man sitting right down there in the light blue suit to die. He has no discretion whatsoever. The jury's verdict controls. I'll talk about the details of how it works in a little bit.

The first thing I would like to know is—you had a chance to fill out a questionnaire on Monday morning probably in a situation where if I were in your shoes, I would have still been reeling a little bit from finding out it was a capital murder case.

A Yes, sir.

[4040] Q I know you didn't have a lot of time to think about it, but you've had a couple of nights to sleep on it now. I would guess it was on your mind to at least some extent. Would you tell us now just in your own words how you feel about the death penalty and whether it serves a purpose in our society?

A Okay. I believe in capital punishment for certain crimes as the law describes. I know there are a lot of people who would disagree with me who don't feel like it should be the law, but that's not to be decided, as I understand from what the Judge said, here. I think it does serve a purpose in certain cases. I do believe that sometimes there are extenuating circumstances that need to be considered. If all the evidence points to there being a conviction, then the jury

really doesn't have a choice. But it's based on that evidence that you have to decide.

Q Okay. How long have you felt this way about capital punishment? Have you ever felt differently?

A No, sir, I can't say that I have.

Q Your mother is still alive; is

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[4056] got to get the death penalty. In that situation, if we failed to prove that one of those questions should be answered yes, the law still requires you to answer it not even knowing it would result in a life sentence rather than the death penalty. By the same token, if you hear the facts of the case and you say, well, this guy doesn't really deserve to die, I don't think he ought to die, yet we've proved that each of those should be answered yes, you're required to answer them yes knowing that it will result in the death penalty. Do you feel like you can do that?

A. Yes, sir, I do.

Q Do you feel like you can set your emotional feelings aside and base your answers to those questions on the evidence that you hear?

A I think those questions are going to be a great help.

Q Okay. If we prove those to you, you will answer them yes and, if we fail to, you will answer them no?

A Yes.

Q There's one thing that may come **[4057]** up. We don't expect it to, but it might. I told you that we call this murder plus. We have to prove the murder plus another offense. Let's take murder and a burglary, for example. You're sitting on the jury and we present our evidence and you hear all about the murder and you hear all about the killing, but there is not a word about any burglary. We don't prove to you anything about a burglary. Then we haven't proved capital murder, have we?

A No, sir.

Q We've just proved murder. The offense of murder, alone, in the State of Texas does not carry the death penalty. It has a range of punishment of from five years up to ninety-nine years or life and a fine of up to $10,000.00, no death penalty. That's the widest range of punishment for any crime in the State of Texas. I guess that's there because of all the various circumstances under which a murder can occur. A murder is the knowing or intentional taking of another human life without any legal justification or without any legal excuse. For example, it you were on the jury and you decided that it was self-defense **[4058]** after you heard the facts, the person is not guilty. It's not murder. If you hear the facts and decide it was an accident, he's not guilty. It's not a murder case. If you hear the facts and decide he was insane, he's not guilty. Again, it's not a murder case. Even if it was a killing in the heat of passion if I came home one night and my little four year old girl had been raped and abused and the guy who did it was standing two houses down with a beer in his hand bragging about it and I took my gun and went down there and blew him away, the jury might find that was a killing in the heat of passion. If it was, then that's not murder, either. It's voluntary manslaughter. Murder is the knowing or intentional taking of another human life without any legal justification or legal excuse.

Now, there could be provocation or excuses or reasons that enter into the situation that don't amount to legal justification or excuses or legal reasons. Do you see the distinction there?

A Yes, sir.

[4059] Q Okay. The law allows you to consider all those things before you assess a sentence. You can hear all the facts of the case. You can hear about the prior relationship between the parties. You can hear what led up to the killing. You can hear if there was a third person involved. You can hear all about the person that did the killing, also. You can hear all those things. What the law asks you to do, Ms. Walsh, is keep an open mind as to what sentence you would give until you've heard all that evidence and to not close

your mind to one end or the other. Therefore, for you to be qualified to serve on this jury, you have to be able to tell us that you have an open mind as to the entire range of punishment for the offense of murder, anywhere from five years up to ninety-nine years or life. If you hear a ninety-nine year case, you can give ninety-nine years. If you hear a five year case, you can give five years.

The law doesn't even ask you to sit there right now and think if a situation where you would give ninety-nine years or think of a situation where you would give five years **[4060]** or a situation where you would give three years because the law does not want you making up your mind, well, this is what it's going to take for me to give a five year sentence. All the law says, if you hear a case that calls for a five year sentence, then you have to give a five year sentence. The phrase the law uses is able to consider, are you able to consider the entire range of punishment. I guess what it comes down to, Ms. Walsh, is this: You've heard the facts and you've convicted someone of the offense of murder, knowingly or intentionally killing another human being without any legal justification or legal excuse. He did it. He knew he was going to do it. He intended to kill the person and he did it plus whatever other facts and circumstances may enter into it. After you've heard all the facts you're going to hear, all the extraneous circumstances, everything about the defendant you're going to hear, if you feel, based on those facts and circumstances, that a ninety-nine year sentence or a life sentence is called for, would you and could you give that?

A Yes, sir.

[4061] Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally killing another human being without any legal justification or without any legal excuse. You've heard all the facts and circumstances and after hearing all the facts and circumstances, you believe in your mind that those facts and circumstances call for a five year sentence, could you and would you give a five year sentence?

A Yes, sir.

Q If it calls for twenty-three years, would you give that?

A Whatever the law calls for.

Q Okay. Whatever the evidence calls for, whatever you believe in your mind and in your heart is the correct sentence, that's what you will give; is that right?

A That's correct.

Q You don't have your mind closed to five years or ninety-nine years or anything in between?

A No, sir.

Q There may even be a situation—I'll submit to you that it ought to be a special case to allow for a life sentence. It ought to be a **[4062]** special case to allow for a five year sentence, the minimum. You may even sit up there and think, I'm never, ever going to hear a case that calls for five years. Thirty years from now you're sitting over here on a jury and you say, after hearing all the facts, I never thought I'd hear one, but here it is. This one calls for five years, so you give five years. That's all the law asks you to do. Do you have any problem with that at all?

A No, sir.

Q Let me mention one other thing while I'm on that subject. You probably heard some discussion of parole?

A Yes, sir.

Q The judge may instruct you and the law is, prisoners in the Texas Department of Corrections can get credit for what is called good-time for their conduct while they're down there. It can be credited against their sentence. They can also be paroled before their calendar sentence has been completely served, but the law goes on to say that those types of things are under the exclusive

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[4102] PAUL BAILEY,

called as jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Bailey. Let me reintroduce everyone here briefly. I'm Paul Macaluso. This is Jim Nelson. We will be joined by another assistant district attorney once the trial itself begins. His name is Norman Kinne. We're the State's attorneys in this particular case.

To Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Bailey?

MR. BAILEY: Fine. Thank you.

Q To his immediate left is Mr. Royce West.

MR. WEST: Mr. Bailey, good afternoon.

Q They're the defense attorneys and

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[4107] personal opinion, no one is going to quarrel with you or argue with you or try and change your mind and talk you into or out of anything. Just speak your mind and we'll respect your opinion and, like I said, you will be doing your job.

Let me tell you what our position is in this particular case. We are actively seeking in this case for Thomas Joe Miller-El the death penalty. We know that the law allows for it under very special types of capital murder cases. We intend to be able to provide a jury—and we have nine people so far and we need three more. We intend to be able to provide this jury once it is selected—and that would mean you if you were on the jury with the type and quality of evidence in the first part of the trial, the guilt or innocence part of the trial, to convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-El, is guilty of capital murder just exactly as he has been indicted.

Then in the second part of the trial, once again we intend to be able to provide the jury—and that would mean you if **[4108]** you were on the jury—with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions, and the questions determine death or life, should be answered yes. You know from what the Judge told you, three yes answers equals a mandatory sentence of death. That's our position based on the evidence.

You understand that ultimately it's the position of the jurors that counts, but we want you to know what our position is from the outset. It is our desire, based on the evidence and allowed for by law, that he be assessed that sentence of death which, as you know--and I don't mean to be gory about this, Mr. Bailey—that means death by lethal injection here in Texas. This is not something, of course, I think you realize, that you may be talking to someone about over coffee or reading about in the paper or hearing on the radio or on T. You are in the middle of the situation where you may be called upon, if you can, to serve on a jury of this type and render a decision, if you can, that might result in your actually making a decision that would **[4109]** result in the execution of that man right down there. That is, at some point in time if the death penalty is returned, he will be taken down to Huntsville, Texas and at some point designated by law, a particular time that is set up, he will be moved over to the death house and at some particular point in time, he will be taken out of the death house and placed on a gurney, taken into the death house itself where there is a procedure where they will put needle into his arm and inject him with a lethal substance sufficient to cause his death. That's the ungarnished truth of the matter. We can talk about it, capital punishment, and call it all kinds of glossy things, but that will be the final result, we feel, based on the evidence in a case of this type, if the jury follows the law and follows the evidence we believe that we're going to be able to present during this trial. Do you see what I'm getting at?

A Yes, sir.

Q All right. So with all that long involved introduction out of the way, as I said earlier, the most important opinion, the most important decision, in this type of a very, **[4110]** very serious case where the stakes are as high as they are, is your opinion. I know you were asked this question about the death penalty here, number fifty-six, "Do you believe in the death penalty?" Originally you circled yes and then you wrote no and you crossed out your answer and you wrote "No one has the right to take another one's life." Why don't you just tell us in your own words—you've had a couple of nights to think about it and mull it over in your mind—how you feel about the death penalty and capital punishment generally speaking and then secondly, how you feel about your ability to actually serve on this type of a case and actually participate in that decision-making process where someone such as the Defendant would be executed?

A My honest opinion—I don't believe in capital punishment. Like I said on there, I don't believe anyone has the right to take another person's life. If he committed a crime and if he is convicted and it's proven without a shadow of a doubt, as you say, then, yes, I believe he should be punished. He should be rehabilitated or whatever can be done, but I

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[4168] between counsel and the Court, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it.

MR. MACALUSO: Judge, in light of the Court's ruling and in light of the statements made by the Court, we'll use a preemptory challenge.

THE COURT: Bring Mr. Bailey back in, please.

Mr. Bailey, you're going to be excused from service in this case. I'm sorry you had to wait out there in the hall.

Off the record, Pam.

(Whereupon, an off the record discussion was held, after which the following proceedings were held.)

THE COURT: Mr. Jones, how

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[4171] RUSSELL L. JONES,

called as a jury panel member, having peen duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Jones. As I was introduced to you on Monday, my name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso. There will be a third attorney involved for the State of Texas whose name is Norman Kinne. Mr. Kinne will present the evidence for the State in this case. We are all three assistant district attorneys and we've been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Bricē Cunningham.

MR. CUNNINGHAM: How are you, Mr. Jones?

Q He will probably be joined in a few moments by Mr. Royce West. Mr. Cunningham and Mr. West have been appointed by Judge McDowell to defendant Thomas Joe Miller-El, the

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[4173] you will feel a little more comfortable and it will be a little easier for you to talk about some things in this format than it would in front of forty or fifty other people. As the Judge said, let me invite you to relax. You don't look nervous up there now. Hopefully you will relax and be comfortable with us and be as honest and as open as you can in talking about these things. Remember that there are no right or wrong answers to anything we're going to talk about.

This is Mr. West right here.

We just need to know how you feel about these things and that's where we're headed and that's what I'm going to try to talk to you about during the next few minutes.

Mr. Jones, I feel like to start things out I ought to tell you what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We know the law allows for it in this type of offense and we intend to present to a jury and to you if you're on that jury the facts and evidence to allow the jury to convict him of the offense of **[4174]** capital murder. Then we intend to present the type and quality of evidence to allow a jury answer three questions yes. If those three questions are answered yes, judge McDowell has no option whatsoever but to assess the death penalty in this case. He doesn't have any discretion in the matter. The decision is made by the jury. We'll talk about that in a little bit more detail as we go through here. That's our position. What counts is your position.

You had a chance to fill out a questionnaire on Monday and you've had a couple of nights to sleep on it. I would guess to come in here expecting to be on another civil case or a shoplifting or something and finding out it's a capital murder would kind of shake me up a little bit, I think. Now that you've had a chance to sleep on it, would you tell us please your feelings about the death penalty, whether it serves a purpose or not, and secondly, whether you feel like you could serve on this type of jury?

A Well, I'm for the death penalty as a matter of principle. I feel like it is a deterrent to crime. I guess I could serve on

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[4187] A Yes, sir.

Q Do you feel like you can set your personal feelings aside and answer those questions based on the evidence?

A Yes.

Q Any problem with that at all?

A No.

Q Okay. Mr. Jones, there's another thing that may come up in this case. We don't anticipate that it will, but it might. I told you that we called this murder plus. Let's take a different case. Let's say you're a juror on a capital murder where it's an alleged murder during the commission of a burglary. We present our evidence and you hear about the murder and we prove beyond a reasonable doubt that the man committed murder, but you don't hear a word about a burglary. There's no evidence at all about a burglary. Then we haven't proved capital murder, have we?

A No.

Q We've proved murder?

A Yes.

Q Murder in the State of Texas is the knowing or intentional killing of another **[4188]** human being. It does not carry the death penalty. The range of punishment for murder in Texas is the broadest for any offense in the State of Texas, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. When I say the knowing or intentional killing of another human being, we're talking about somebody who did it, knew they were going to do it, intended to do it, however you want to put it. It's not a self-defense situation because if the jury finds self-defense, then a person is not guilty. It's not an accident. If the jury were to find it was an accident, again, he's not guilty. If the jury were to find that he was insane at the time, he would be not guilty. It's not a killing in the heat of passion.

I have a four year old daughter. If I came home one night and I found out that somebody had come in and raped and abused her and the guy that did it was standing two houses down with a beer in his hand laughing about it, I might very well go down there and just blow him off the face of the earth. If I did that, the jury might decide that was a killing in the **[4189]** heat of passion. That's not murder in Texas. That's what we call voluntary manslaughter. It's a different crime with a different range of punishment. So we

say murder is the killing of another human being without any legal justification or without any legal excuse. Again, those are self-defense, accident, the things I ran through. Would you agree with me, Mr. Jones, that there are hundreds, if not thousands, of different situations in which one person could kill another person?

A Yes.

Q I imagine that the four lawyers here could sit here with you from now until tomorrow morning and we could keep coming up with examples of different ways murder could occur. We aren't allowed to give you examples, just like we're not allowed to give you the facts of this case. There may be provocation involved that doesn't amount to self-defense and it doesn't amount to a legal excuse or legal justification, but it's still something you can consider. You can consider the prior relationships between the parties. You can consider if there were third persons involved. **[4190]** You can consider anything leading up to the murder. All the surrounding facts and circumstances come into play. In order for you to be qualified to serve on a jury like this, Mr. Jones, you have to be able to tell us that you have an open mind as to that entire range of punishment, that your mind isn't closed to one end or the other or to the whole thing, for that matter. When I say to have an open mind, the legal phrase used is able to consider, are you able to consider the entire range of punishment. You don't even have to me able to sit there right now and think of a situation where you would give a life sentence or think of a situation where you would give a fifteen year sentence or think of a situation where you would give a five year sentence. The law doesn't even want you to do that. If you were sitting there and decided, well, this is a five year case and this is what I have to hear to give five years, then you've closed your mind to some other things that might be a five year case. Obviously you can't tell us right now what you would do in a case because you haven't heard any of the evidence, so you don't know.

[4191] Again, it's back to that old phrase. We're asking you to keep an open mind until you've heard all of the evi-

dence. What we need to know from you, Mr. Jones, is if you can consider that entire range of punishment. Let me put it this way: if you were sitting on a jury and you convicted a person of murder, he knowingly or intentionally caused the death of another human being without any legal justification, without any legal excuse, they killed them, knew they were going to kill them and they did it, after you've heard all the facts and circumstances of that case, everything about the offense itself and, everything about the defendant, other persons that might have been involved, all the surrounding facts and circumstances, if you believed after hearing all of that, that those facts and circumstances justified a ninety-nine year or life sentence, could you give a ninety-nine year or life sentence? That's been a pretty long-winded question.

A It sure was.

Q Do I need to compact it a little bit?

[4192] A Well, I think I could look at it openly and make a judgment yes or no.

Q If the facts and circumstances called for a life sentence, you could give a life sentence?

A Right.

Q Let's go to the other end. Again you've convicted somebody of murder. You've heard all the facts and circumstances. If those facts and circumstances in your mind justify and call for a five year sentence, could your give a five year sentence, could you give a five year sentence for the offense of murder?

A I guess I could make a decision, but five years for murder—

MR. WEST: I'm sorry, sir. I didn't hear the last part.

A I said the five years for murder would be kind of light.

Q Okay. As I said, it's a very wide range of punishment for the offense of murder. I guess there is a myriad of circumstances under which murder can occur. What we're asking you, Mr. Jones—as I think I said, you don't even have

to be able to think of a **[4193]** situation that calls for five years. You may say, I can't imagine hearing a set of circumstances that would justify a five year sentence for the offense of murder. What we're asking you is—you may be sitting here twenty from now on another case, a murder case, and you've heard all the facts and circumstances and you say, wow, I never thought I'd hear it, but here it is. Here is that one in a million case that the facts and circumstances justify a five years sentence. If you get in that situation and those facts and circumstances say to Mr. Jones that it calls for a five year sentence, can you give a five year sentence?

A Yeah, if the facts say it and that's what the law says.

Q That's the law and that's what the judge will instruct you is the law. You're asked to base your verdict on the evidence, on the facts and circumstances. If that evidence calls for twenty-three years in your mind, then you could give twenty-three years. If it calls for life, you could give life. If it calls for five years and you thought five years was proper in your mind, you will give five years; **[4194]** is that right?

A I guess I could, but—

Q Okay.

MR. WEST: Your Honor, could this gentleman be allowed to finish his answer?

THE COURT: Did you have something you wanted to add to that, Mr. Jones?

A I thought that I would listen to the evidence and it was either guilty or not guilty, you know, answer the three yes. So why are you bringing up the five years?

Q Okay. As I talked about earlier, we have murder plus in this case.

A Right.

Q There is also the possibility—we don't anticipate it, but there is the possibility that you would not find that this murder was committed in the course of a robbery, so you

would find in that case that he was guilty of murder, not of capital murder. The only time those questions come into play is on capital murder. If you as a jury feel that we have not proved capital murder, all we have **[4195]** proved is murder. If you find him guilty of murder, then it will be your duty to assess they punishment for that case of murder. It's what we call a lesser included offense of capital murder. That's why I'm having to go into all this stuff because it's kind of like buying flight insurance, I guess. You don't expect Delta Flight No. 121 to go down in the field north of DFW, but people buy flight insurance on the slim chance that it might. Since there is a possibility that you might be put in that situation, then we have to be sure that you're qualified under the law to assess the punishment in that situation for the offense of murder. In order for you to be qualified, you have to be able to consider that entire range of punishment for the offense of murder, not capital murder. Does that make it more clear?

A Right.

Q All we're asking of you, Mr. Jones—and I'm sorry I didn't make that clear earlier. It may be an extremely rare case and probably should be an extremely rare case where you would give either extreme of punishment, see that extremely rare case, that **[4196]** the facts and circumstances justify a sentence of five years, could you give a sentence or five years?

A Yes, I could, yeah.

Q That's the law. That's what the law says in Texas. You may personally feel that, if you were governor or you had the power to set the range of punishment, you might say it ought to be fifty years and up for murder or something like that. Just like I might say, when I get out in west Texas, that I ought to be able to drive eighty-five instead of fifty-five when you can see a hundred miles in every direction. But the speed limit is fifty-five, so that's what I drive. If the law is—they may not believe that's true. If the law is that the range of punishment is from five years up to life for

the offense of murder, you could abide by that law; is that right?

A Yes.

Q If you hear a five year case, you could give a five year sentence?

A Yes.

Q There is one other thing that you've probably heard something about and that

* * * *

[4240] FILEMON P. ZABLAN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Let me begin by reintroducing everybody here. You may remember anyway, but I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q The man to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good afternoon, Mr. Zablan.

Q The vacant chair next to him will be occupied by Mr. Royce West. They're the defense attorneys who have been appointed by the Court to represent the Defendant. He's in the far right chair over there. Can you see him there? His name is Thomas Joe Miller-El and he is charged with capital murder.

Jim and I are assistant criminal district attorneys here in Dallas. We represent the State. Do you know any one of us or have **[4241]** you ever heard of any one of us?

A No, sir.

Q Mr. Zablan, as you know, you are a prospective juror on this case. We have nine jurors so far. We've considered over a hundred people so far and we only have nine. You can see it's a very drawn-out and tedious process. This is the middle of the fifth week that we've been doing this.

We want to talk to you and basically we want to find out how you think and how you feel about certain things and I want to emphasize right from the start that no one is going to argue with you or quarrel with you about your feelings about anything. No one is going to try to talk you into anything or out of anything. We just want to know how Mr. Zablan feels because this is a very, very serious case as I'm sure you know. It involves the very highest level of offense. Mr. Miller-El is charged with capital murder. If a person is convicted of capital murder in Texas, he can receive only one of two possible penalties. One is a sentence of death by lethal injection and the other is a sentence of life. You can **[4242]** see how high the stakes are and how serious this is and why we need to talk to you seriously to see how you feel about certain things.

I'm going to say this again because I do repeat myself. I want you to understand that no one is going to try and change your mind or argue with you about anything. What is absolutely the most important, Mr. Zablan, is you simply tell us honestly how you feel about anything that might affect your service on this case. Will you do that?

A Yes.

Q If you have a question about anything, ask it. If there is something that you need to tell us, tell us. Don't be bashful. The other thing is, I want you to relax.

Ordinarily we would be talking to you out in front of a bunch of other people. We want you to relax as much as you can and feel as comfortable as you can and just speak your mind.

Let me tell you what our **[4243]** position is, that is the position of the State of Texas. we are actively seeking the death penalty in this case for that Defendant right down there. In other words, we know that the law allows in certain cases for the death penalty and we intend to provide the

type of evidence to a jury, once it is selected, that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as he is charged. Now, that's done in the first part of the trial.

In the second part of the trial where the penalty is returned, either death or life, we intend again to offer the jury the type of evidence that would convince them beyond a reasonable doubt that those questions should be answered yes. You know the result, all yes answers, yes, yes, yes, equals death. There is no question about it. If the jury answers each question yes based on the evidence, then the law absolutely requires Judge McDowell to sentence that man right there—take him down to Huntsville, Texas and eventually have a needle put in his arm and they would kill him.

[4244] The reason why I mention that is not to make it sound real dramatic or tragic or anything, but it's just that a lot of people I suppose come down here on jury duty thinking they are going to be on a burglary case or a theft case or something like that or a DWI. All of a sudden they get into this courtroom and they find out they're involved in a death penalty case. It's no longer a situation where we all sit around at various times and talk about how we feel about this and how we feel about that, over coffee or a beer or something. How do you feel about the death penalty? It's one thing to talk about it, isn't it, and it's another thing to find yourself in a position where you may be called upon to actually make the decision that would result in this man actually being executed. You know that they, a execute people.

It's not like it was ten years ago where they gave people death sentences, but no one was ever executed. They were all commuted to life or whatever happened. I'm just trying to draw things into focus for everybody, just in fairness to everybody, so they really **[4245]** appreciate just how serious this is and then of course how incredibly important any decision you make is and what effect it would have if you serve on this jury.

Now, I've done enough talking. I know you filled out a questionnaire on Monday and you had very little time to accomplish that. Now that you've had a couple of days to sleep on it, would you share with us your personal feelings about the death penalty generally speaking and then your ability to actually serve on a jury of this type and make a decision based on the evidence and the law? How do you feel about the death penalty?

A The way I feel is, is that the punishment should fit the crime, no more, no less.

Q Do you feel that the death penalty serves a particular purpose in our society as a function?

A Yes, sir.

Q How do you perceive that?

A I guess, if somebody is really guilty of like shooting a person, beyond a reasonable doubt he is guilty, then he is going **[4246]** to be a menace to society and he should be put away.

Q Have you felt that way for a number of years?

A I have not given it a lot of thought, but when I do, I have to be really convinced because it is taking a man's life away.

Q The law absolutely requires you to be convinced beyond a reasonable doubt.

A Yes.

Q Your response to question number fifty-six in the questionnaire was "If it's the law and if the crime fits such punishment."

A Yes, sir.

Q I gather from what you said there—you didn't have a whole lot of time to think about that—that you're the type of person who believes very strongly in following the law. Some of us have some misgivings about some of the aspects of the law, but the courtroom is not the place to change the law.

A The reason I said that is, if it is the law, I believe in it. Some states don't have a death penalty. If I live in that state **[4247]** and abide by it, unless somebody comes over and changes the law, then that is the law for me.

Q If it is the law, whether you agree or disagree with it, you're going to follow it?

A Yes.

Q And your answer here, if the facts of the crime, what you learn once the trial begins, calls for a guilty verdict, then you will go by the facts and the law?

A Yes.

Q You can put aside your personal feelings one way or the other and follow the law and be guided by the facts?

A Yes.

Q Even though you may be guided by this aspect of the law?

A It depends on the case. If in my conscience there is really no question about it, then I would have no reservation in applying the law. I might follow the law with some reservation, but it is the law and I have to have it clear in my conscience.

Q Let's talk a little bit about capital murder. A person can only receive the **[4248]** death penalty in Texas as an option in very special circumstances, very limited number of circumstances. Number one, it must involve, but just not any kind of murder. It must be a very, very special type of murder that the law has designated and called capital murder.

Now, murder is actually an offense in Texas. That is what we call a first degree felony. It is not an offense that you can receive the death penalty for. Murder carries a punishment of from five years to ninety-nine years or life and you can even receive an optional $10,000.00 fine. Murder becomes capital murder when it is the killing of a particular class of individuals, you murder a police officer or a fireman, prison guard, you kill someone to collect insurance or mass

murder. Situations under those circumstances are elevated to capital murder where you can receive the death sentence or a life sentence, one person killing another person during a burglary, robbery or while raping them. Murdering somebody during an arson or a kidnapping, the law says that is a special type of murder and is even more serious and you can **[4249]** receive the death sentence or a life sentence only because it is a capital murder. Do you have any problem with that?

A No.

Q Murder plus a felony, that is called murder plus. We have alleged in this indictment that the Defendant murdered a man named Douglas Walker while in course of committing or attempting to commit robbery. Do you see what I'm getting at, murder plus? Does that type of offense, murder during a robbery, strike you personally as the type of offense that you feel the death penalty would be warranted depending on the facts of the case?

A Yes.

Q And assuming we prove the Defendant is guilty beyond a reasonable doubt, you could find the Defendant guilty of capital murder?

A Yes.

Q Let's talk a little bit about some things that come into play in any type of a criminal case and certainly in a capital murder case. This may sound like a civics lesson on some things that are fundamental whether it is **[4250]** a shoplifting case or a capital murder case. I know you're familiar with all of these things, but we want to go over them in a case like this just because they're so incredibly important in fairness to both sides, okay?

A Okay.

Q First off, you start off with the presumption of innocence. You understand that?

A Yes, sir.

Q That's something that is fundamental to our system of justice, as you well know. That is, at the start of a criminal trial, anybody charged with a crime is presumed to be innocent. All right?

A Yes, sir.

Q In other words, as you look at the Defendant over there, you must tell us in all honesty that you presume that he is innocent. That's where we start off. That's the starting point in any criminal trial. You must look towards the State to overcome or rebut the presumption with the evidence to convince you beyond a reasonable doubt that he is guilty, otherwise you continue to believe that he is not guilty. Can you do that?

[4251] A Yes, sir.

Q In other words, the fact that he has been arrested , and we can reasonably assume he has been arrested and indicated and that he is here in the courtroom today, some people might say, well, you know, where there's smoke, there's fire. He must but a little bit guilty. Well, you know that's not how the law works. No one is just a little bit guilty. We either prove that he's guilty or he's innocent. Do you see what I'm getting at?

A Yes, sir.

Q As he sits there, you have no problem at all presuming that he is innocent; is that correct?

A That's right, sir.

Q All right. I can't think of anything that is any more fundamental to our system or any more important that that. Now, you understand that the indictment is on evidence of guilty. You understand that?

A Yes, sir.

Q We can go to the Grand Jury and get an indictment and accuse somebody of an offense, but that doesn't mean we can prove it, **[4252]** does it?

A That's right, sir.

Q You know that people are charged by indictment all the time and juries find them not guilty. Cases are dismissed sometimes. So the indictment is no evidence at all. All it is, is a legal document that tells him what he is charged with and that's all it is. It doesn't matter how bad it sounds, but it's not any evidence at all and you would not consider it as any evidence, would you?

A No, sir.

Q Okay. The next thing is, you know that the burden of proof in any criminal case is always on the State?

A Yes, sir.

Q We have brought forth this indictment and we have accused him of capital murder and the law says we can do that, but you know the old saying, he who does the accusing does all the proving. It's kind of like, put up or shut up type of deal. That's what it boils down to. When I was a kid growing up, that's how it went. We pointed the finger at him and the law says, fine, but we must come **[4253]** forward with all of the evidence to convince you, as you said you would require, to convince you beyond any reasonable doubt whatsoever that he is guilty and then, if we do, the law is clear. You should find him guilty, do you see, if we convince you beyond a reasonable doubt.

On the other hand, if we don't convince you beyond a reasonable doubt, if we don't live up to our burden of proof, you should find him not guilty. Will you do that?

A Yes, sir.

Q All right. It's really pretty cut and dried, isn't it?

A Yes.

Q If we prove what's in here beyond a reasonable doubt and you don't have any reasonable doubt, you find him guilty. If we don't, cut him loose. Fair enough?

A That's right.

Q Now, understand that we have the burden of proof at all times, in both phases of the trial, in both arts of the trial. The Defendant and his lawyers have absolutely no

burden of proof whatsoever, none. The only requirement that the law sets out for a **[4254]** defendant in a case at any time is that he be here for the trial. I'm reasonably sure that he will be here for the trial, but beyond that he can sit there and not say a word and not call a witness and not do a single thing because he has absolutely no burden to do anything under the law at all. Do you have any problem with that at all?

A No, sir.

Q That seems fair enough under our system, doesn't it?

A Yes, sir.

Q Okay. The same thing, he has no burden to disprove anything. In other words, you can sit over there as a juror and listen to the State and see what kind of evidence we bring forward and, if we convince you beyond a reasonable doubt that he did this, if we do fine, you convict him. But if we don't, you cut him loose. Whether he calls any witnesses or whether he testifies or not, it doesn't matter. Can you do that?

A Yes, sir.

Q In other words, when you look towards the proof in support of this **[4255]** indictment, where are you going to look?

A To the State.

Q To the State, at the prosecutor?

A Yes, sir.

Q That's us. Okay. Now, you understand that any person charged with a crime, and that would hold true for me, for you, or anybody, my daughter charged with a crime, they have the right to remain silent. You know in the Soviet Union, as you well know, you're guilty until you prove yourself innocent, right?

A Yes.

Q That's not how it is here obviously. Even though anyone who is charged with a crime can testify and they can

call witnesses if they want to, you know that they have no burden to do that. If a defendant chooses not to testify, then you cannot consider that as any evidence whatsoever of the defendant's guilt. Do you understand that?

A Yes, sir.

Q In other words, even though you may be curious why a defendant didn't get up and testify, if he doesn't, the law that the **[4256]** judge would actually instruct you he would actually give you written instructions that you cannot talk about it, think about it, or even consider it as any evidence whatsoever of the defendant's guilt. Would you have any problem in that regard at all?

A No.

Q Can you tell the Defendant and tell us that you would not consider a failure of his to testify as any evidence at all? Can you tell him that?

A Yes, sir.

Q Now, let's talk about criminal trials generally speaking and how they're conducted. Have you served on a jury before?

A No, this is the first time.

Q A criminal trial is divided into two parts. The first part concerns itself only with the guilt or the innocence of the person who is on trial. In other words, you listen to the evidence and at the end of the first part of the trial, if you're convinced the Defendant is guilty, find him guilty. If we haven't convinced you, whether the defendant has testified or not, cut him loose. Fair enough?

[4257] If you find him not guilty, that's the end of the trial. If on the other hand you find him guilty, then we go on into the second phase where you get these questions and that's where the determination is made as to either death or life.

Now, you understand that just because you convict somebody of capital murder doesn't mean that they automatically get the death penalty. You understand that?

A Yes.

Q In fact, you understand that they either get a death sentence or a life sentence depending upon the answers to those questions. You understand that we're seeking the death penalty and we're the ones that want the death penalty just like we want you to convict him, based on the evidence. The law says, fine. Just like the law says we must prove and convince you beyond a reasonable doubt that he has committed the offense, the same thing would hold true in the second part of the trial. We have the burden of proof to convince you that the questions should be answered yes. You know the effect of three yes answers equals death **[4258]** automatically. The law would automatically require the Judge to assess a sentence of death.

One or more no answers equals an automatic life sentence. Do you see what I'm getting at?

A Yes, sir.

Q If we expect you to answer those questions yes and if we want you to answer those questions yes, then we must convince you beyond any reasonable doubt by the evidence that the questions should be answered yes.

A That's right.

Q Then he gets the death sentence. If not, if we don't convince you beyond a reasonable doubt and if you think one of those questions should be answered no, then so be it and he gets his life sentence. Fair enough?

A Yes, sir.

Q Will you make the State prove that each of those questions should be yes before you answer them yes? Would you require that kind of proof beyond a reasonable doubt?

A Oh, definitely.

Q Okay. Now, in the old days, until **[4259]** about thirteen years ago, in a capital murder trial, after the jury heard all the evidence, they actually decided life or death directly just like they do in the movies. If all of the jury believed he

should get death, he got death. If they all agreed it should be life, then that's what it was.

Let me ask you, do you think you could have made a decision like that based on the evidence after you heard the evidence in a capital murder case? If you felt it was proper to give death, you would have given death and if you felt it was proper to give life, you would give life?

A The majority rule and, if all the evidence was presented and I don't have any reservations in my mind, no doubts, then I would say yes.

Q You understand that the jury has to act unanimously? In other words, you vote your own conscience individually. You decide for yourself what you think is proper, but for any verdict to result, say the death sentence, must be unanimous, all the jurors must agree.

A That's right.

[4260] Q Now, the law changed about twelve years ago and no longer do the jurors decide directly, personally, subjectively, whether or not someone should die or get a life sentence like they used to do in the old days. Instead all you're called upon to do is to listen to all of the evidence in both parts of the trial, you see, and then the Judge would give you those three questions to answer. He may only give you the first two, but whether he gives you two or three, you're called upon to answer the questions. If the proof is there that convinces you that the questions should be answered yes, you answer them yes. If not, you answer them no.

You know that the effect of all yes answers is death and one or more no answers is life. Can you do that?

A Yes, sir.

Q Let's look at the questions. I think you probably had a chance to read the first two questions while you were sitting out with the panel here the other day. Do you have any questions about them at all?

A I have no questions.

[4261] Q How about number three?

Q [sic] I have no questions.

Q Okay. Let's look at them very briefly, okay? The first question, I think, is pretty self-explanatory, isn't it?

A Yes.

Q It asks you to decide whether the defendant acted deliberately and with the reasonable expectation that someone was going to die. Can you see when you learn about the facts of the offense and how everything happened you could make that decision, did the defendant act deliberately and with the reasonable expectation that someone was going to die? Do you see how you could answer that question yes or no depending upon the evidence?

A Right.

Q Let's go on to number two. That's a question that looks towards future behavior, would you agree with me?

A (No response.)

Q Well, let me just ask you this: What do you think you're being asked in that particular question?

A In other words, would he commit **[4262]** another murder over there.

Q Sir?

A I said would he commit another murder, in number two, if he's set free.

Q Okay. Would you agree that a key word in, that question is that word probability?

A That's right. That's what I'm looking at, probability.

Q What does probability mean to you in the context of that question? What do you think that means?

A It may happen and it may not happen.

Q More likely not, fifty-fifty?

A That's right, fifty-fifty.

Q I noticed that you said murder, that he would commit another murder. You notice that they didn't say another murder, did they? They said criminal acts of violence. Would

you agree with me that murder, of course, is a criminal act of violence?

A Yes.

Q What comes to your mind when you think of criminal acts of violence?

A Continue to be a menace to **[4263]** society.

Q Like committing some criminal acts of violence. It may be a murder. It may be a robbery.

A That's right.

Q It may be some sort of physical assault of some type.

A That's right.

Q Mr. Zablan, what do you think would be most helpful to you in answering those questions yes? What would you want to know about the background or about an individual that you feel would be most beneficial in answering that question?

A Well, I have to know like the background of the individual, his environment, where he grew up, who his friends are and usually background, environment and home, I guess.

Q Okay. Let me ask you, would you agree that almost every human event is divided into three phases; what happens immediately before the event, what happens during, and what happens after?

A Yes, sir.

[4264] Q Even a capital murder. In other words, you would be able to learn when you learn about the offense if there was any planning involved in the murder, what role a defendant had, if any at all. In other words, was he directly involved or indirectly involved? Then during the offense, was he a leader or was he a follower, did he have to do the killing, did the killing have to happen or was there some other course of action that could have been taken instead of killing somebody? Do you see what I'm getting at?

A Yes.

Q Afterwards, was he sorry and remorseful, was he contrite or was it blase and nonchalant, you know, another day at the office? Do you feel you could learn enough about an individual when you learn all the dynamics, the full spectrum of criminal behavior, of one criminal episode where you could say, yeah, there's a chance that this guy is going to commit—he would be a menace to society from now on? Do you think you could answer the question yes when you learned all about the crime itself?

[4265] A Yes, sir.

Q Now, number three, that asks you basically—that boils down to this, I think: Was this a provoked killing or was it an unprovoked killing? Would you agree with me?

A Yes, I agree with you.

Q If you decided that it was an unprovoked killing, then you question yes?

A Yes.

Q If you decide that there was some provocation—

A Then I have to answer it no.

Q Right. You could answer that yes or no as well; is that correct?

A Definitely.

Q You understand that these questions here are provided, I think, to the jury to kind of insulate a jury from emotional decision. In other words, under the old way the jurors decided emotionally or subjectively whether someone should die or live. Now, we know you could be sitting over there, any juror could be sitting over there, and listen to a capital murder case and decide, **[4266]** well, yeah, it makes your blood boil. You could hear facts that are so bad. Yet, on the other hand—you know, that would cause you to convict somebody. But yet on the other hand, when it comes to answering these three questions, the State may not have given you enough answers to satisfy you that the questions should be answered yes. Do you see what I'm getting at?

A Uh-huh.

Q You understand that your oath as a juror would require you to answer the question no which would result in a life sentence. Do you see what I'm getting at?

A Yes.

Q Something contrary to your personal feelings. The same thing would hold true, if you decided that someone ought not to die, but you would say that you would vote for a life sentence. You can't vote for a life sentence, can you? All you can do is answer the questions. If the proof measures up to three yes answers which would result in a death sentence, you have to go ahead and answer them. In other words, you put aside your personal **[4267]** feelings and simply answer the questions and let the law take its course. Can you do that?

A Yes, sir, I could.

Q Okay. Let's shift gears here for a second and let's talk about something that I'm not suggesting would occur in this case, but we'll just discuss it because there is always the possibility. Let's imagine for a moment that you're on a jury, a capital murder jury. Let's say that the indictment alleges a murder plus a burglary. That's capital murder. Let's say you hear all the evidence that convinces you beyond a reasonable doubt that murder occurred, but you don't hear any evidence about the burglary or you have a reasonable doubt, so you're not convinced that the murder occurred during a burglary. Am I making myself clear?

A Yes.

Q Bearing in mind that we must prove both the murder and the burglary if we expect you to find that defendant guilty of capital murder, you see we haven't lived up to our burden, have we?

A No.

[4268] Q All we have proved is murder. We didn't prove capital murder, did we?

A No, you didn't.

Q Now, if that were to happen let's say you found someone not guilty of capital murder, but instead guilty of what we did prove, which was murder, then you have to forget all about life or death, you see, because that's not even in the range of punishment. Am I making myself clear?

A Yes.

Q The range of punishment for murder, and murder is a separate offense altogether, under the laws of Texas is as broad as it is for any offense. There is no broader range of punishment whatsoever. The legislature has set out, we feel, that broad range, from five years to ninety-nine years or life and a $10,000.00 fine, so that the jury can basically tailor the punishment to fit the crime once the jury has heard all of the facts. Fair enough?

A Yes.

Q That's what it boils down to. know that's a cliche, make the punishment fit **[4269]** the crime, but it's true. That's what the law says. Number one, the law expects you simply to tell us, to be a qualified juror, that you will follow the law, consider that full range of penalty and that you have not closed your mind to any part of that range of penalty, to have an open mind and you will tell us that you have—of course, you haven't heard any evidence yet—

A No, I haven't.

Q —and you're an open-minded person and you will wait and you will listen to all of the evidence and then and only then, once you've heard all of the evidence in the murder case, you will decide what the penalty ought to be. If you hear facts and circumstances that call for and warrant and justify—in other words, you just feel it's the right thing to do to give the maximum, you will give the maximum. If on the other hand, you're a juror on a murder case and you have an open mind and you sit over there and you listen until all the facts are in and you hear a fact situation that to your way of thinking calls for and warrants and justifies and again it's **[4270]** the right thing to do based on the evidence which

you've heard to give the minimum, you will give the minimum. Can you do that?

A Yes, sir.

Q You know as well as I do—we've both lived long enough to know to know [sic] this: A murder is a murder. Sure, it's bad because someone dies, someone has been killed. Will you agree with me that there are all different types of facts and circumstances that surround murders?

A Yes.

Q And the law allows you to decide whether a case should get the maximum for murder or the minimum or somewhere in between—the law allows you to consider all the important things like what? Like the background of the victim. What kind of a person was the victim? What kind of person was the defendant? What happened? What precipitated this murder? What were the circumstances? What brought this thing on and why?

A That's right.

Q Do you see what I mean?

[4271] A Yes.

Q Now, murder is actually a situation where one person knowingly or intentionally causes the death of another. Those are legal terms, knowingly or intentionally. The Judge will actually define them.

A Because in my mind I have to be sure—or I have to be sure that the man is innocent all through the trial. He's got to be innocent until the very last word has been said. Whether he's guilty or not—

Q That [sic] precisely [sic] correct.

A That's going to be in my mind. I'm not going to prejudge or anything else. I'm just going to sit there and listen and find out what the heck is going on and why is this guy over here or if he's supposed to be out there in the streets working somewhere, why is he in here.

Q In other words, you will guided by the evidence?

A That's right, sir.

Q And you will be guided by the law; is that correct?

[4272] A Definitely.

Q In other words, you said you're not going to prejudge anything. You will have an open mind. What I'm getting at about murder is, the law allows you to take into consideration all of the facts and circumstances surrounding a murder and then you decide what the proper thing to do is once you have all that evidence presented to you. I want you to bear in mind a couple of important things. Murder is a situation under the law legally speaking where one person knowingly or intentionally causes the death of another. That's without any legal excuse or any legal justification. In other words, it's not self-defense and it's not accident. If you found that somebody killed someone and it was an accident or in self-defense, you would have to find them not guilty. Do you understand that? That's not murder.

A That's right.

Q If for example you thought someone was insane, that's a homicide, but it's not murder. For example, if you had a situation where somebody killed someone and it was a **[4273]** crime of passion—for example, if somebody came home and found out that their daughter had been raped by the neighbor and the neighbor is up the street laughing about it, drinking a beer and bragging about it, and that father got a gun and went up there and killed the neighbor, you see, that's a homicide and it's a crime, but it's not murder. That's what we call a crime of passion. We're not talking about that. We're talking about where one person, for whatever reason he may have that you might learn about during the trial, killed somebody and it's murder. Are you telling us that you will wait in a situation like that and, if you see a case that calls for the minimum, five years, you will give five years? If you feel that's the right thing to do, can you give—

A Yes.

Q If you hear a fact situation and you feel after you've heard all of the facts that it calls for ninety-nine years or life

and you think that's the right thing to do, will you give ninety-nine years or life?

A Yes, sir.

[4274] Q And anywhere in between that you feel is proper; is that correct?

A Yes.

Q In other words, you haven't closed your mind to a five year sentence or a ninety-nine year sentence?

A No, sir.

Q One other matter here and let me just address this briefly. The Judge would also instruct you as to the law of parole. Now, you've heard of parole, haven't you?

A Yes, sir.

Q What this means basically as the Judge will instruct you, anyone who is charged with a crime and convicted of a crime, whether it be murder, burglary or whatever it may be, and is sentenced to the department of corrections may become eligible for parole and good-time. In other words, that's good conduct in the penitentiary. The judge would instruct you as to the law in that regard. Then the judge would go on and tell you that, since it cannot be accurately determined how that will actually come into play, in other words, how soon someone would be paroled or how much good **[4275]** time they would get, do you see, that you as a juror could not consider that in deciding how much penalty a person should get. Am I making myself clear?

A Yes, sir.

Q In other words, they kind of tell you about it and then they say to forget it. That's what the law expects of you. The judge will actually instruct you that you cannot consider it in deciding whether someone gets five years, fifteen years or how much time they're going to serve before they get paroled. You just put that all out of your mind. If you think someone deserves five years, you give them five years. If you think someone deserves ten years, you give them ten or ninety-nine years or life. Can you do that?

A Yes.

Q One last matter. You understand that you as a juror will decide the believability or the credibility of the witnesses who testify?

A Yes, sir.

Q the law is very clear about this, that you do not prejudge any particular **[4276]** witness because of the nature of their profession or occupation or their station in life. In other words, you take the witnesses as they come. You don't give anyone a head start, so to speak. You just sit there and tell us that you would judge everybody by the same yardstick and you will wait and keep an open mind and listen to what they have to say and then after they say what they have to say, you will decide how much or how little of their testimony to believe.

A That's right.

Q Can you do that?

A Yes, sir.

Q One last matter, I promise. The Judge talked to you about basing a conviction on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt. Can you do that?

A Yes, sir.

Q Mr. Zablan, I'm out of time and the Judge has been very patient with me. Do you have any questions at all of me at this time?

A No, sir.

[4277] Q Can you be fair to both sides?

A Yes, sir.

Q I think you can, too, Mr. Zablan. Thank you very much.

MR. MACALUSO: I'll pass the juror.

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[4296] at the number of years that you are to assess. Could you and would you do that, sir?

A Yes, sir.

Q Do you know of any reason why you could not be a fair and impartial juror if chosen, sir?

A Nothing at this time.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: Your Honor, the State would be pleased to accept Mr. Zablan as a juror on this case.

MR. CUNNINGHAM: The defense would be pleased to accept Mr. Zablan as the tenth juror in this case.

THE COURT: Thank you. Mr. Zablan, let me ask you first of all to raise your right hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: You have just been sworn as a juror in this case. As one of the lawyers, I

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[4301] ANNA L. KEATON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Keaton. You may remember from Monday that my name is Jim Nelson. I want to reintroduce everybody here because it's been a couple of days. The gentleman seated next to me is Mr. Paul Macaluso. There will be one other attorney involved for the State of Texas when we start the testimony in this case and his name is Norman Kinne. The three of us are assistant district attorneys here in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

The man to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Keaton.

Q Next to him is Mr. Royce West.

MR. WEST: Ms. Keaton, good

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[4304] uncomfortable, but the law requires me to do it. It may seem like I'm going back over things eight or ten different ways from time to time, but again the law requires me to do that kind of thing, so I hope you will be patient with me and bear with me as we go through this. I'm really not such a bad guy. I'm not trying to make anybody uncomfortable.

Now, I guess I ought to start out, Ms. Keaton, by telling you basically what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We know the law allows it. We feel like we will be able to present the type and quali[t]y of evidence to a jury to convict him of the offense of capital murder. We also feel, Ms. Keaton, once he is convicted of the offense of capital murder, we will be able to present the type and quali[t]y of evidence to allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice in the matter but to assess the death penalty for that man sitting right there in that light blue suit.

[4305] Now, I know when I talk about things like capital punishment or the IRS laws or whatever it is, it's pretty easy to talk about when you're not really involved. We're down here talking about Thomas Joe Miller-El's life, whether he's going to live or die. The people that sit on this jury are going to make that decision, Ms. Keaton. I guess it's kind of like a job. I want you to be as clear as you can be in what you would be dealing with if you served on this jury and what's coming because, once you have a seat over there, it's too late for you to change your mind. We have to find out now whether you're the kind of person that can serve on this kind of jury [sic]. Like I say, we've been working on this for five weeks and we have ten people. You can that everybody is not suited to serve on this kind of jury. It's

kind of like me walking over to one of these buildings they're building down here and somebody asks me to be a steel worker and walking a beam seventy floors up.

I guess I'm physically qualified to do it. I've got two arms and two legs and reasonable sense of balance, but there's no way **[4306]** in the world you would get me up on the seventieth floor walking a beam that is that wide (indicating). I just wouldn't do it. Although I'm qualified, I'm not suited to do that kind of thing. We've had people come down here the same way and serve on this kind of a jury.

Ms. Keaton, I guess what it comes down to is, we want you to know, if the evidence comes out the way we expect it will, the way we anticipate that it will, we're going to ask the jury to answer those three questions yes. If they are, that means that Thomas Joe Miller-El, sitting right there, at some point will be sentenced to die. He will be taken to Huntsville, Texas and placed on death row where he will stay until a few days before the time appointed by law at which time he will be moved to a group of cells near what they call the death house. At the time appointed by law, he will be taken from his cell. He will be put on a gurney—or I was told last night, it's called a litter, one of those rolling beds that they put you on to go to surgery or something—and he will be strapped down. **[4307]** That man right down there will be taken into the death house. He will have an IV put into his arm and they will start what they call a saline solution in that I. As he lays there, at the appointed time, a doctor will put a lethal substance into that IV and that substance will be injected into his veins until he dies, until the life is gone from that man sitting right down there, Thomas Joe Miller-El.

I'm not trying to draw horrible pictures or anything, but at some point we anticipate that is going to happen. The jurors that render that verdict are going to have a part in that. Now, I feel like it is only fair that you know that's our position and that's what we anticipate.

Now, on Monday you had a chance to fill out a questionnaire. It's very lengthy and we've gone over those. The one

question I want to focus on at least right now is question number fifty-six, "How do you feel about the death penalty?" You answered it. You said, "It's not for me to punish anyone," I believe are the words you used on it. You've had a couple of three days to sleep on it now and to **[4308]** think about it. I would just like you to tell us, if you would, in your own words what your feelings are about the death penalty and whether it serves a purpose in our society?

A Well, I still think it's not for me to decide.

Q Okay. Let me go a little bit farther. As I said, we still need two more people to serve on this jury. People who are going to serve on this jury are going to have to decide after hearing the evidence.

A Yes.

Q First of all whether he's guilty or not guilty and second whether he's going to receive the death penalty or not. We don't want, Ms. Keaton, twelve blood-thirsty people jumping up and down to give this guy the death penalty. That's not the way it's going to work. That's not what we're going to have. What we do need, both sides need, is twelve people who feel that they can make the decisions that need to be made. If the evidence shows that he's guilty, they will find him guilty.

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[4314] A Can I say something?

Q Sure.

A This is me. I wouldn't even think of killing anybody unless I was trying to save myself.

THE COURT: That's what we need to know, Ms. Keaton, just that kind of thing. How you feel, which way you feel, is important and I think the lawyers would agree. We care how you feel, but we don't care which way you feel. In other words, we just need to know how Ms. Keaton feels about any of these questions including that. I think that's what the lawyers are asking and maybe sometimes they ask it a little different than maybe I would or the other lawyers

would, but that's just the way lawyers are. We ask questions different ways at different times, but as long as you tell us how you feel about these things, that's really all

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[4328] about the death penalty, the fact that you couldn't kill somebody. Did you have those feelings even before he started getting into trouble?

A I think I've always had those feelings.

Q Okay. I hope you understand that no one here is trying to change those feelings. We're just trying to—

A I understand.

Q I guess what we're trying to do is get them down on paper for the court reporter and the Judge and make sure that we're clear on everything because I'm certainly not going to argue with you and these lawyers over here shouldn't argue with you because I think you've made it very clear how you feel about things.

Just to kind of wrap things up, I want to try to summa rize, if I can. You correct me if I say anything that you disagree with or I say anything that is wrong. You've told us that you've felt all your life basically that you can't be involved in killing another human being unless it is to save your own life; is that right?

[4329] A Yes.

Q Also because you have a son who has been in some trouble, you feel sympathy or whatever word you want to use for his family and the situation they're in and it is because of those things that you don't feel like you can sit on this jury and be part of sentencing a man to die; is that right?

A Right.

Q Ms. Keaton, based on that, if you were given a choice, which you will be, whether to take the oath or not take the oath to sit on this jury, would you refuse to take the oath and say, I just can't do it, Judge? Again, there's noth-

ing great about serving on the jury and nothing bad about not serving. We just need to know because, if you don't feel like you can in good conscience sit on that jury and answer these questions, then no one is going to make you.

A I don't think I could.

Q Okay. So you would prefer not to take the oath; is that right?

A Right.

Q Ms. Keaton, we've been talking **[4330]** here for a half an hour or maybe a little bit more and no one is going to argue with you and, if I tried, I couldn't change your mind, could I, couldn't change your feelings about these things?

A No, you couldn't change my feelings.

Q No one is going to play lawyer with you and no one is going to try to change your feelings and no one should argue with you. I think you've made them very clear. These lawyers over here may have some questions for you, but I'm sure they aren't going to argue with you or try to change your mind. By telling me what you've told me, I think it's pretty clear how you feel and I appreciate your honesty with me and your patience with us, also. Thank you very much, Ms. Keaton, and I've enjoyed talking with you.

MR. NELSON: Your Honor, I'll pass the juror and also submit the juror.

MR. CUNNINGHAM: Your Honor, we have a legal question we need to take up.

[4331] THE COURT: Okay. The best way to do this is maybe give you a little chance to get off the witness stand. I need to take a law question up with these lawyers, so let me ask you to step out in the hall.

(Whereupon, Ms. Keaton left the courtroom, after which the following proceedings were held.)

MR. CUNNINGHAM: Your Honor, we believe that Ms. Keaton is qualified through Wainright versus Wick, in that the State has not shown; one, that she could not take the oath; two, she has not said that she would automatically vote

no to one of those questions to keeping him from getting the death penalty. Her last answers with respect to the oath were, "I don't think I could", "I would prefer not to." She has not positively stated "I will not take

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[4373] I'll give you a chance to argue with me as I have been.

MR. NELSON: We'll excuse, Ms. Keaton.

MR. WEST: For record purposes we would indicate that she is a black female.

MR. NELSON: We would also like the record to reflect, Your Honor, our reasons for using a preemptory strike is her equivocations on the ability to give the death penalty, her comments to me that the fact that this man would die would affect her ability to answer those questions and would affect her in listening to the evidence and further that she has a son who has been involved in the penal system and she sympathizes with Thomas Joe Miller-El's mother and knows how she would feel. We feel because of that, she could not be fair.

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[4377] FERNANDO GUTIERREZ,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. Let me begin by reintroducing everybody here. You may remember anyway, but I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q The man to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q The vacant chair next to him will be occupied by Mr. Royce West. They're the defense attorneys who have been appointed by the judge to represent the Defendant. He's in the far right chair over there. Can you see him there?

A Yes.

Q His name is Thomas Joe Miller-El. He's charged with capital murder. Jim and I **[4378]** are assistant criminal district attorneys here in Dallas and we represent the State. Do you know any one of us or have you heard of any one of us?

A No, sir.

Q Mr. Gutierrez, as you know you are a prospective juror in this case. We have ten jurors so far. We've considered over a hundred people so far and we only have ten. You can see that it is a very drawn-out process. This is the middle of the fifth week that we've been doing this. We want to talk to you and basically we want to find out how you feel and how you think about certain things and I want to emphasize, Mr. Gutierrez, right from the start that no one is going to argue with you or quarrel with you about your feelings. No one is going to try and talk you into anything or out of anything. We just want to know how you feel because this is a very serious case, as I'm sure you know. It involves the very highest level of offense. Mr. Miller-El is charged with capital murder. If a person is convicted of capital murder in Texas he can receive only one of two possible penalties. **[4379]** One is a sentence or death by lethal injection and the other is a sentence of life. You can see how high the stakes are and how serious this is and why we need to talk to you seriously to see flow you feel about certain things.

I do repeat myself, but I'm going to say this again. I want you to understand that no one is going to try and change your mind or argue with you about anything. what is most important, Mr. Gutierrez, is that you simply tell us

honestly how you feel about anything that might affect your service on this jury. Can you do that?

A Yes.

Q If you have a question, sir, about anything, ask it. If there is something that you need to tell us, tell us. The other thing is, I want you to relax. Ordinarily when we talk to you, you would be out in front of forty or fifty other people. We want you to relax as much as you can and just feel as comfortable as you can and just speak your mind. Okay?

A Yes, sir.

Q Let me tell you what our position **[4380]** is, Mr. Gutierrez, that is the position of the State of Texas. We are actively seeking the death penalty in this case for that Defendant right down there. In other words, we know that the law allows in certain cases for the death penalty and we intend to provide the type of evidence to this jury, once it is selected, that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as he is charged. That's done in the first part of the trial.

In the second part of the trial where the penalty is determined, either death or life, we intend to again offer the jury the type of evidence that would convince them beyond any reasonable doubt that those questions that we just talked about should be answered yes. You know the result of all yes answers yes, yes, yes, equals death. There is no question about it. If the jury answers each question they get yes based on evidence, then the law absolutely requires Judge McDowell to sentence that man absolutely requires Judge McDowell to sentence that man right there—take him down to Huntsville, Texas and eventually have a needle put in his arm and they would kill him.

[4381] The reason why I mention that is not to make it sound real dramatic or tragic or anything. It's just that a lot of people come down here thinking that they're going to be on a burglary case or a theft case or something like that or a DWI. All of a sudden they get up in this courtroom and find out that they're involved in a death penalty case. It's no

longer a situation where we all sit around and talk about how we feel about this or that over a cup of coffee or a beer or something. How do you feel about the death penalty? How do you feel about capital punishment?

It's one thing to talk about it, isn't it?

A Yes.

Q And it's another thing to find yourself in a position where you may be called upon to actually make the decision that would result in this man actually being executed. You know that they execute people. It's not like it was a few years ago when they gave people death sentences and then they never executed them. They were commuted to life or something else. I'm just trying to bring **[4382]** things into focus for everybody and just in fairness to everybody so that they really do appreciate just how serious this situation is and then, of course, how incredibly important any decision you make is and what affect it would have if you serve on this jury.

Now, I've done a lot or talking. We want to know how you feel. You were asked the question about the death penalty. That was on Monday and today is Thursday and you've had a little bit of time to think about it, haven't you?

A Yes, sir.

Q Have you done some more thinking about it?

A I sure have, sir.

Q Why don't you just tell us as openly as you can how you feel about the death penalty and then whether or not you feel you could actually be the one to make a decision that would end this man's life?

A Ever since I was informed of the nature of the crime, I realize that it was time to stop talking and really think about it. I have thought about it and there is still a **[4383]** thinking process going on in my mind as to what the actual reaction is because I don't guess anybody is really sure of what they would do until finally you come to that point. I'm sure, if the evidence proves that the answers are yes, then that would be a person's responsibility to answer

yes to all three questions. As far as personally how I feel about, it's something that is still unclear in my mind. I have respect for life as everybody does and sometimes that has to be put aside for a greater need of the people.

Q All right. If you could, would you expand on that a little bit and tell us how you feel about the death penalty generally. I know you've expressed yourself a little bit to this point. I mean, do you feel there are circumstances where people ought to receive the death penalty?

A I believe in the nature of the crime, maybe possibly brutality or other evidence that pointed to that it was justified. There are some crimes which I would imagine to serve the life, but more evidence would point that this particular crime was deserving of it, **[4384]** then I believe it should receive the death penalty.

Q Let me put it this way: Could you tell us what you think of, what comes to your mind, as the type of case or type of individual, the type of Defendant, where you feel that you could vote for the death penalty, that you could feel that it would be justified that somebody be legally executed? What sort of offense comes to your mind? What would it take, for example?

A At first I think of some crazy that's mentally insane. Of course that's off the top of my mind. That's basically as far as I have narrowed it down.

MR. CUNNINGHAM: I can hardly hear you.

A Should I repeat that?

Q Yes, sir.

A At the top of my list for the death penalty, I would immediately think of somebody that is criminally insane and with no hope of rehabilitation.

Q Let me just say this because I know most of the people who come down here are **[4385]** not lawyers and obviously are not well-versed in the law. If you were on a jury, whether it be a capital murder case or any kind of a case, and you found somebody was criminally insane, then you couldn't convict them of any offense. That's a defense. Just like that

guy Hinckley who shot the president, he shot the president and everyone saw him, but you know that jury apparently believed that he was insane at the time or had a reasonable doubt about it and they found him not guilty by reason of insanity. Do you understand, if you were on the jury, you would have to find somebody charged with capital murder not guilty by reason of insanity, so can you think, of any other example?

A Okay. I guess what I was really thinking, now that the law is clear, is just somebody that is maybe a habitual murderer or something that really needs to be taken up.

Q Let me just ask you: Do you could hear facts of a single crime that would be bad enough where you would feel a person to your way of thinking be deserving of the death penalty?

[4386] A I believe if the brutality of the crime was such because I have a feeling that in the commission of a crime some of the circumstances could possibly make a person react in a different manner, but nonetheless the crime is done.

Q Let's suppose you hear—you know, when you learn about a crime whether it may be a capital murder or whatever it may be, you can learn basically the three phrases that surround any event; what happens before a crime, what happens during a crime, what happens after. It's like any event. For example, if you were on a capital murder case—you see, capital murder in this particular instance, in this indictment, we have alleged a murder, that the Defendant murdered a man while he was robbing him. He was robbing somebody and then he kills them, see. That's what we would have to prove to you beyond a reasonable doubt.

So you decide in the second part of the trial whether the questions should be answered yes or no which actually results in the death sentence or a life sentence. You **[4387]** would be allowed to consider whether or not—what happened before the crime, what happened during the crime, what happened after. For example, was the robbery planned? Was it well planned? Who did the planning? Did the Defendant do it or did someone else do it? Did he know

beforehand that he was going to rob somebody, take a gun for example and go in there, plan it all out, choreograph the whole thing? Could you consider that important?

A Yes.

Q All right. What about during the crime where you would hear about what role he had to play? Was he a bystander? Was he the look-out or the get-away driver? Was he there calling all the shots and giving all the directions and pulling the trigger? Do you see? Did he have to kill the individual? Was it necessary or could he have just walked away? Do you see what I'm getting at? Are those some of the circumstances that you're thinking about?

A Yes, sir, I believe so.

Q How vicious was it? Did he have to do that? Then afterwards, was he the type of person who afterwards hung his head and **[4388]** said "Oh my, God. What have I done? I'm sorry. I wish I could wipe it away?" Was he the type of person who just didn't care anyhow? He was just completely nonchalant, just relaxed and cool as a cucumber. If you took those things into account, do you feel like you could learn enough about an individual from on offense where you could say possibly to your way of thinking that's the type of person that deserves the death penalty?

A I believe so, sir. Presented with the proper evidence of the crime, I do believe that I could answer the questions fairly.

Q Let me just ask you this: On question fifty-eight, you put down there—the questions is "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" You indicated, yes, that you did have some personal belief or moral belief that would prevent you from doing that. Is that the way you felt on Monday or have you changed your mind or what?

A Well, after thinking about it, **[4389]** like I said, I have always talked about it and I've had some religious beliefs about it, but then I sort of thought about it and then—if

I can go to the Bible, it says to obey the laws of man and there immediately I said, well, I should be part of the judicial process and make sure that an individual gets a fair trial. If he is deserving of death or life or of innocence, then he should, I believe—I could give a fair opinion after the evidence is presented.

Q Let me just ask you in all honesty, Mr. Gutierrez, do you feel like you're leaning one way or the other? Are you more likely to feel that someone ought to be spared than leaning the other way? Some people think most criminals ought to be executed. Some people think that way. Some people think that we should give them another chance and some people say, obviously whatever the law says. If the facts call for it and I think it's the right thing to do, I'll just do what the law says. Do you see yourself leaning one way or the other or do you see yourself down the middle?

[4390] A I don't think so. I pretty much—as growing up, I have always been called upon every now and then to settle a matter here and there and I've learned to be unbiased and just to give my opinion of things. I believe at this point that I have no bias one way or the other.

Q You understand that we have to rely, in selecting a jury here, basically on what you tell us now. I'm just being as straight with you as I possibly can. When you came down here on Monday you said that you did have some religious feelings about it and we just want to be sure that what you tell us—I'm not suggesting that you're being dishonest with us, but that you don't change your mind because we rely on what you tell us now and, if you got on the jury and said, well, I've changed my mind about that, I could never do that, you know, when it comes down to it, my religion and stuff, my moral feelings, my personal feelings, are such that I couldn't do it, then that wouldn't really be fair to us, would it? The same thing would hold true for the Defendant. If you say, well, you know—**[4391]** well, if you just change your position against him. Do you see what I'm getting at?

A Yes.

Q Now, we have to rely on what you're telling us. Do you have any reason to believe that your opinions would change between now and in the next couple of days or next week?

A No, sir. Like I say, given these few days, I've really brought it down to myself as to what would I really do. I really believe that the fair trial would the most—well, what everybody deserves and I've put aside—I still believe in what I put there, but many times you have to put aside what you believe for the sake of getting a fair trial and fair judgment.

Q Why do you think personally that some people some people ought to be executed?

A The nature of the crime, the brutality of it.

Q If they're continuously committing crimes, do you think that should enter into the decision also? In other words, if most of his life he's been committing serious crimes, do **[4392]** you think that's another reason, another factor, that should enter into your decision?

A I don't believe—immediately I think that that kind of evidence is inadmissible.

Q Well, No. If a person is charged with a crime, in the punishment phase of the trial the jury gets to learn if that person has been convicted of other serious offenses before. In other words, is this the first time he's ever done anything wrong or is he the type or person who has been violating the law all of his life or most of his life.

A If those crimes have been increasingly more and more violent, I believe that would point in that direction.

Q What sort of crimes do you think a person ought to be able to receive the death penalty for?

A Murder in the gravest circumstances, brutality and—

Q Do you feel strongly about murder?

A Yes, I do.

Q Let's talk a little bit about murder and capital murder. Murder is a

* * * *

[4452] MAX W. O'DELL

Called as a jury panel member having been duly sword by the Court to testify to the truth, the whole truth and nothing but the truth was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q As you may remember from Monday, my name is Jim Nelson. The man seated next to me is Paul Macaluso. There will be one other attorney involved for the State of Texas in this case and his name is Norman Kinne. The three of us are assistant district attorneys in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good afternoon, Mr. O'Dell.

Q And seated next to him is Mr. Royce West.

MR. WEST: Mr. O'Dell, good afternoon, sir.

Q These two gentlemen are attorneys in Dallas who have been appointed by Judge

* * * *

[4454] little more relaxed in this situation than you would be talking in front of forty or fifty strangers, if anybody can be relaxed sitting up on the witness stand with four lawyers staring at you. We do hope that you will relax. Understand that there are no right or wrong answers to anything we're going to ask. Were just trying to find out how you feel about some things. If you will bear with us, it gets a little tedious at times, but everything we do is necessary under the law.

Mr. O'Dell, let me tell you just right out of the box what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We believe we will be able to present to a jury of twelve people the type and quality of evidence to prove beyond any reasonable doubt that he is guilty of the offense of capital murder. We further believe that we will be able to present the type and quality of evidence to prove that each of three questions should be answered yes. If each of those questions is answered yes, then Judge McDowell must under the law assess a death [4455] sentence in this case and we anticipate at some point that death sentence will be carried out because we anticipate that's the way the evidence will come out. That's basically our position and what we plan to do once the trial in this case starts.

Our position doesn't make a whole lot of difference. What counts is your feelings and your position. You had a chance on Monday to fill out this questionnaire, which I've already made reference to once, and one of the questions on it was whether you believe in the death penalty. You've answered that in a little bit of detail, as a matter of fact, but I would like to ask you, if you would, to tell us in your own words, having had three or four days to sleep on it now, how you feel about the death penalty and whether it serves a purpose in our society?

A Well, I feel that it does because I think it—they say that it does act as a deterrent. I think—well, capital crimes should be punished by capital verdicts. That's the way I feel about it. I think every case should be on its own merits or dismerits or

* * * *

[4471] A I believe so.

Q Any problem with that?

A I don't see any.

Q Okay. Let me talk about something that may come up. We don't anticipate that it will, but it might so I'm going

just in case, I guess, so to speak. We've told you that this type of offense is called murder plus, murder plus a robbery. If we present our case and you hear all the facts of a murder and we prove to you a murder. We prove to you that a person knowingly or intentionally caused the death of another human being, but you don't hear a word about a robbery. There's no evidence at all that there was any robbery involved at all, then it's just a murder and we haven't proved capital murder. All we have proved is the offense of murder in the State of Texas. Am I making myself clear on that?

A Yes.

Q If that's the case, then the death penalty is no longer a potential punishment.

A But you've already stated that you're going for capital murder?

Q Right. We feel like we can prove **[4472]** capital murder, but murder is a lesser included offense of capital murder. If you were to decide beyond a reasonable doubt that he is guilty of murder, but that you have a reasonable doubt whether there was a robbery committed or not, then the law would require you to find him guilty of murder rather than capital murder.

A Does the Judge tell you what—

Q It's going to be up to you. You will get instructions as to what—

A He will define it?

Q Right. As to what murder is and what capital murder is. If you find this, this is murder and if you find this, this is capital murder and, if you have a reasonable doubt, he's not guilty and so on. You will be instructed on all of that. If you should find him guilty of murder rather than capital murder, a whole different range or punishment comes into play. No more death penalty. The range of punishment for the offense of murder in the State of Texas is from five years up to ninety-nine years or life and a fine of up to $10,000.00 is optional. You can assess it, **[4473]** but you don't have to.

The law says in order for you to be qualified and eligible to serve on this jury, you have to be able to consider that entire range of punishment. I'm going to get to that, but let me throw some more things into the pot while we're doing this. When we talk about murder in the State of Texas—I've told you basically the definition, knowingly or intentionally killing another human being. If it is self-defense, if you find self-defense, it's not murder. He's not guilty. If the jury were to find it was an accident, it's not murder and he's not guilty. If the jury were to find that the person was insane, then he is not guilty by reason of insanity and he's not convicted of murder. It could be a killing that is less than murder. If I came home and my little four year old daughter had been raped and abused and the guy that did it was standing next door with a beer in his hand and actually bragging about it and I went and got my gun and blew him off the face of the earth, the jury might decide that was a killing in the heat of passion rather than a murder. If they did, **[4474]** that would be voluntary manslaughter which is a different offense with a different range of punishment. Those are legal justifications and legal excuses for killing a person.

There may be things that enter into the murder scenario that don't amount to legal justifications or legal excuses. There may be provocation, but it's not enough that self-defense is found. You could hear about the prior relationship between the parties. You could hear if this is an on-going feud or if it's a spur of the moment thing and all the background to the offense. Would you agree with me, Mr. O'Dell, that there is probably a myriad of circumstances under which one person could kill another person?

A Definitely agree. I've had some of them. Some of them are bad drivers.

Q Okay. I suppose, if we sat here for the rest of the day, we could give you example after example after example of different situations where one person kills another person. We aren't allowed to do that under the law. We can't give you examples. We can't go into the facts of this case. Now,

[4475] you mentioned bad drivers. If something is done recklessly, one person kills another person recklessly, that's not murder either. That's involuntary manslaughter which is another type of offense.

When we talk about murder, we're talking about the knowingly or intentionally killing of another person without any legal justification and without any legal excuse. Again, there may be some provocation. There may be some probleMs. There could be all kinds of things that enter into it that don't amount to legal justifications or legal excuses.

I guess what it comes down to, the way I've heard it put, he knew he was going to kill them. He intended to kill them and he killed them for whatever reason. There could be all kinds of reasons, but that's what happened. The law says you have to be able to consider that entire range of punishment for the offense of murder. We don't ask you to tell us right now that you will give life for murder or you would give thirty years or you would give five years because you haven't heard any of the facts. As you pointed out at the **[4476]** outset, you have to hear the evidence before you would know what you would do on any case.

The law does say, after you hear all of the facts and circumstances, then you're going to have to make a decision and the law wants you to have an open mind as to that entire range of punishment as you're listening to all the facts and circumstances. You don't even have to be able to sit there right now, Mr. O'Dell, and think of a situation where you would give a life sentence or think of a situation where you would give a five year sentence, either one. As a matter of fact, the law doesn't want you to try to think up those situations because, if you did, you've almost mentally committed yourself that I have to hear this for it to be a life sentence or I have to hear this for it to be a five year sentence. There may be another case out there that you didn't think of that deserves life or that deserves five years.

What the law says basically is, you must be—the legal phrase is able to consider. What that means is, after you've heard all of the facts and circumstances, **[4477]** you've heard

everything you're going to hear about the case, the facts of the case, the defendant, everything you're going to know, if you believe after listening to all those facts and circumstances that a sentence of life and a fine of $10,000.00 is appropriate in your own mind and called for by those facts, can you give it?

A I think so, yes.

Q Let's go to the other end. Again, we're talking about knowingly or intentionally killing another person, no legal justification, no legal excuse. You've found this person guilty of murder. Once you've heard all the facts and circumstances, again everything about the offense, the facts of the case, the defendant and everything you're going to know, if you believe personally in your own mind that those facts and circumstances call for and justify a five years sentence for the offense of murder, can you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and think of what those facts and circumstances would be. We **[4478]** have people come down here and say, I can't imagine what it would be, but—one in a million maybe would be a five year case, justify a five year sentence. Then that person may be sitting down here twenty years from now on a jury and listening to a case and say, well, I never thought I'd hear it. I never thought I'd see one, but this case calls for five years and so I'm going to give five years. That's all we ask of you, Mr. O'Dell. If you hear that case, whatever it is and whatever it may take to convince you that five years is appropriate, would you give five years?

A Uh-huh.

Q The same thing on the life sentence or the ninety-nine year sentence. It probably should take an exceptional case to justify either end of the spectrum, but if you hear a case that calls for a life sentence based on the facts and circumstances, could you and would you give a life sentence?

A Yes.

Q Back to the same old phrase you've probably heard me use twenty times already and that's can you keep an open mind and listen to **[4479]** the evidence and make a decision based on the evidence that you hear?

A Yes.

Q That's all we ask you to do. That's all anybody can ask you to do.

You've probably heard about—there's been a lot of discussion about parole in the State of Texas. The law says and the Judge may instruct you that prisoners in the Texas Department of Corrections can under certain circumstances earn what is called good-time which is credit against their sentence. They can also under certain circumstances be paroled before the end of their sentence. It goes on to say that is in the exclusive jurisdiction of the Board of Pardons and Paroles and the governor of the State of Texas. You can't control it. We can't control it. Judge McDowell has no control over it. It's up to the people in Austin.

As a result of that, the law goes on to say that even though you know about that, you cannot consider that for any purpose in assessing a sentence. In other words, you can't adjust a sentence to take into account

* * * *

[4487] Q In other words, you're on a honey-do schedule, right?

A That's correct.

Q Honey, do this. Honey, do that.

A You've got it.

Q Okay. Now, I want to talk about your personal beliefs. You indicated that you're Catholic?

A That's correct.

Q If you had to describe Max O'Dell, how would you -- say I'm a prospective employer and you're applying for a job and I ask you to describe yourself in ten words or less, how would you describe yourself?

A Well, to sell myself I would say that I think I can do your organization a lot of good.

Q I would ask you why. Why could you do my organization a lot of good?

A I'd say because I am a loyal employee.

Q Now, I'm going to ask you to give

me your thoughts, your personal beliefs. Now, let me preface this question with this: There is no wrong answer. You cannot give us a wrong

* * * *

[4526] held.)

THE COURT: Mr. O'Dell, I'm sorry for sending you in and out, but we were talking a law question. The juror has been passed, Mr. Nelson. What says the State?

MR. NELSON: Your Honor, the State of Texas would be pleased to have Mr. O'Dell as a juror on this case.

THE COURT: Mr. West?

MR. WEST: We will excuse Mr. O'Dell.

THE COURT: Mr. O'Dell, you have been excused from service in this case.

Off the record, Pam.

(Whereupon, there was an off the record discussion, after which the following proceedings were held.)

MR. CUNNINGHAM: In Cause No. F85-78660-NL, State of Texas versus Thomas Joe Miller-El,

* * * *

---- INDEX REFERENCES ---

IN THE CRIMINAL DISTRICT.COURT NO. 5
OF DALLAS COUNTY, TEXAS

[Filed April 14, 1996]

CAUSE NUMBER F85-78660-NL

THE STATE OF TEXAS

v.

THOMAS JOE MILLER-EL

PRE-TRIAL HEARING

APPEARANCES:

THE HONORABLE NORMAN KINNE,
THE HONORABLE JIM NELSON
THE HONORABLE PAUL MACALUSO
Assistant District Attorneys Dallas County, Texas

[Filed November 20, 1996]

FOR THE STATE OF TEXAS

THE HONORABLE E. BRICE CUNNINGHAM

THE HONORABLE ROYCE WEST
Attorneys at Law Dallas, Texas

FOR THE DEFENDANT

BEGINNING on the 12th day of March, A.D., 1986, the above entitled and numbered cause came on for hearing, THE HONORABLE PAT MC DOWELL, Judge presiding, and the following proceedings were had, to-wit:

INDEX

March 12, 1986
MOTION TO QUASH

WITNESS	ATTORNEY	PAGE
JOHN SPARLING		
Direct Examination	By Mr. Cunningham	26
Cross Examination	By Mr. Kinne	40
Redirect	By Mr. Cunningham	42
Recross	By Mr. Kinne	47
Further Redirect	By Mr. Cunningham	49
Voir Dire	By Mr. Kinne	52
Can't. Redirect	By Mr. Cunningham	53
JACK HAMPTON		
Direct Examination.	By Mr. Cunningham	57
Cross Examination	By Kinne	63
Redirect Examination	By Mr. Cunningham	68
LARRY BARAKA		
Direct Examination	By Mr West	72
Cross Examination	By Mr. Kinne	78
Redirect Examination	By Mr. West	80
RALPH TAIT		
Direct Examination	By Mr. West	83
Cross Examination	By Mr. Kinne	88
NORMAN KINNE		
Direct Examination	By Mr. Cunningham	91
PAUL MACALUSO		
Direct Examination	By Mr. Cunningham	95
HAROLD ENTZ		
Direct Examination	By Mr. Cunningham	101

WITNESS	ATTORNEY	PAGE
Cross Examination	By Mr. Kinne.	104
ED KINKEADE		
Direct Examination	By Mr. Cunningham	106
Cross Examination	By Mr. Kinne	113
Redirect Examination	By Mr. Cunningham	115
JOHN STAUFFER		
Direct Examination	By Mr. Cunningham	116
Cross Examination	By Mr. Kinne	126
Redirect Examination	By Mr. Cunningham	130
SUSTAIN MOTION TO QUASH		133
ARGUMENTS ON MOTIONS		140
K. K. KIRBY		
Direct Examination	Mr. Kinne	157
Cross Examination	Mr.Cunningham	163
Redirect	Mr. Kinne	167
Recross	Mr. Cunningham	169
MARK YEAKLEY		
Direct Examination	Mr. Kinne	174
Cross Examination	Mr. Cunningham	176
Redirect	Mr. Kinne	180
Recross	Mr. Cunningham	181
Further Redirect	Mr. Kinne	183
Further Recross	Mr. Cunningham	183
STIPULATION		186
MARCH 13,		
MOTION TO SUPPRESS		

WITNESS	ATTORNEY	PAGE
Mr. West		189
Mr. Cunningham		191
ARRAIGNMENT	By Mr. Kinne	199
JURY SWORN IN		201
INDICTMENT READ	By Mr. Kinne	207

PRE-TRIAL EXHIBIT INDEX

STATE'S EXHIBITS

	MARKED	IDENT.	OFRD.	ADMTD.
No. 1 arrest warrant	160	160	160	161
No.1A Affidavit	167	168	169	169
No. 2 Affidavit	162	163	163	163

PRE-TRIAL EXHIBIT INDEX

DEFENDANT'S EXHIBITS

	MRKD	IDENT.	OFRD.	ADMTD.
No. 1 handout	30	31	31	31
No. 2 news Article	49	49	49	50
No. 3 news Article	49	50	51	52

No. 4 news Article	134	134	134	140
No.5 news article	134	135	135	140
No. 6 news article	134	135	135	140
No. 7 seven questionnaires	—	141	141	—

PRE-TRIAL EXHIBIT INDEX

DEFENDANTS EXHIBITS

No. 8 News article	—	195	195	—
No. 9 news article	—	196	196	—

(News clips of tv news of 3/12/86 were offered without benefit of an exhibit number, and there was no actual, tangible evidence.)

[1] PROCEEDINGS

THE COURT: This is the State of Texas versus Thomas Joe Miller-El on various motions. Both sides ready?

MR. NELSON: State's ready, Your Honor.

MR. CUNNINGHAM: The Defense is ready, Your Honor.

THE COURT: I think the first thing I probably ought to take up is a motion on behalf of the Dallas Morning News filed by Mr. John McElhaney to quash the subpoenaes issued in this case. Mr. McElhaney, may I hear you? I might as well dispose of that.

MR. MCELHANEY: The motion we filed is based on the first amendment to the United States Constitution, and article1 section 8 of the Texas Constitution regarding freedom of the press. Very simply, the Motion To Quash the Subpoenaes was filed because the balance which needs to be struck between the sixth amendment right to call witnesses on the part of the criminal accused and the first amendment freedom of the press, at first blush do conflict, in the sense that the press desires not to have their time taken up in research incorporated by litigants of either side in cases in which the press is not a party. On the other hand, we realize that the accused has a right to subpoena witnesses. [2] So, that the approach used by the Courts is to balance necessary competing interests. And one of the fundamental tests under the Constitution in this area is whether there are less intrusive means on the part of the party who wants the information to obtain that same information, and if so, then the first amendment privilege carries. If not, then there's a balancing, weighing test that the Court can use. And we realize the privileges of the press are conditional privileges. Our position here, very simply and I think very correctly, is that this is a very clear case where the defendant issuing the subpoena has not satisfied the test, even prima facie, because the information sought on the face of the news article referred to in the subpoena appeared in the Sunday March 9, 1986 Dallas Morning News article; which on its face purports to be a report on a study of court [3] records. These are official court records, the Dallas Morning News had no special access to these, these are available for anybody to look at, for anybody to do their own compilation in any manner they want. So, subpoenaing a reporter in a case like this merely to rehash the work that they did in analyzing public records we think is, in fact, an abuse of the privilege. The United States Supreme Court in a case, Bransburg versus Hayes, I think has some language that very clearly illustrates the problem the press has here. That is, they said, "We do not hold that litigants are free to, quote, annex the news media as their own investigative arm." That's in effect what has happened here, the defendant has tried to annex the re-

search, and expertise, and work of the Dallas Morning News to make them his involuntary investigator. That's where the Courts, I think unanimously, are willing to draw the line as a practical matter. This article came out on Sunday, this is the very first week since then that the article has been out. We can anticipate that we could be bombarded with requests, not only [4] here in Dallas County every Monday morning for jury selection, but throughout the entire state. And the tying up of the reporters and making them involuntary experts for either side in litigation is, in fact, an interference with their news gathering efforts. Because, instead of being available to properly report news, these reporters stood by yesterday morning, in fact were here at the courthouse yesterday morning from these subpoenaes. Mr. Cunningham said, "Well, come on back tomorrow, we'll have them on stand by." So, here they are standing by being detained and diverted from their ordinary reporting duties. So, there is a direct actual impact on their abilities. That is the basis for our Motion To Quash.

THE COURT: Thank you. They are available, just not here.

MR. CUNNINGHAM: In response to the last part. First, as I told Mr. McElhaney yesterday when I arrived here shortly before 9:00 o'clock, the attorneys were under the impression that the Court would be here. The Court was not here. That is why, after I [5] talked with the Court I advised Mr. McElhaney that the Court would not be here, and that as soon as we found out what time the Court wanted to reset this matter I would notify him; which I did. I also extended to him and his clients the privilege of not being here this morning at 9:00 o'clock, but I asked him to have them on stand by. I hope that Mr. McElhaney is not arguing that reporters for newspapers are not subject to subpoenaes, because I think that he, as well as this Court, is perfectly aware that reporters, just because they are reporters, are not exempt from being subpoenaed as witnesses in a case. If this was a DWI case, his argument may have some validity, but the State has actively told this man that they are going

to seek the death penalty. So, this is the most extreme form of punishment that can be assessed on any individual under our Penal Code and under our system. As the Court well remembers, during the selection process of the twelve jurors there were constant objections and constant statements by the Counsel for Mr. Miller-El with respect and to the manner in which the [6] State was exercising some of its peremptory challenges. And it was stated at that time that it was the position of the defendant that the ten peremptory challenges that were used to strike black members of the prospective jury, in the opinion of the Defense, were done to strike them simply because of their race, in that all ten had qualified. And I think the records will reflect that ten of their fourteen strikes were used to strike black males and females who had been qualified under our system by talking with either one of—well, one side, one of each of the lawyers an the Court. I would also advise the Court that the process does not end just with us subpoenaing Mr. McGonigle and Ed Timms about the article that they wrote on Sunday, or the one they wrote on Monday, or the one they wrote on Tuesday. That is just the first step, along with other procedures, and other subpoenaes that have been issued, and other matters that will be offered into evidence on behalf of Mr. Miller-El to show the Court that, and request of the Court, that the twelve jurors that have been selected be [7] excused, and that he be allowed to proceed with the selection of another jury panel free from the taint that the present twelve has. Therefore, we submit that because of the seriousness of the charge that Mr. Miller-El stands indicted for, and jurors have been actively told that they're going to seek the death penalty, and that it is their intention. Also, I think our motion goes to the practice of whether or not there is a policy of the Dallas County District Attorney's office to exclude minorities and/or blacks from sitting on, not only felony juries, but in Mr. Miller-El's case a capital murder jury, the most serious of offenses. We submit that the articles by the Dallas Morning News, along with what we have already contended and with other material we propose offering, will all go to support our contention; at which time we

will again move to strike this jury and let us proceed in choosing another one.

THE COURT: Okay, Mr. Cunningham. Mr. McElhaney, do you want to—

MR. CUNNINGHAM: We are not concerned with McGonigle and Timm's source, we are more [8] concerned with the article they wrote, that they wrote it, and the material that they used. And we are not concerned about their source, if they think we want to know whether John Jone's or Mary Smith told them this, we're not concerned with that.

THE COURT: The material, according to what Mr. McElhaney said, doesn't it mostly come from public records? I haven't read all the article, I read some of it.

MR. CUNNINGHAM: There are various individuals, Your Honor. My understanding is that they examined four thousand four hundred thirty-four prospective jurors. And out of that number, they made a determination that ninety-two percent of the blacks were excused, roughly four hundred and five. They also indicate that they examined one hundred trials randomly.

THE COURT: All right. I am going to do this, Mr. Cunningham—I hope it is not .a disservice to anyone—because of the number of people that have many other things to do besides being here, I am going to, Mr. McElhaney, take the Dallas Morning News' [9] motion under advisement. If you will bear with me on this, at least until I hear all the testimony relating to this particular motion. Mr. Cunningham, I will let you—I notice you have other people under subpoena. I have had several contact me about schedules. I would like to have benefit of their testimony, if any, and give me a chance to look at law on the first amendment question.

MR. CUNNINGHAM: The first step to proceed with was with the news reporters, then to Judge Sparling, then to some other witnesses.

THE COURT: At this point in time, I guess I will not grant the Morning News' request, but I will not rule on it

until I have a chance to maybe hear some other witnesses and the chance to look at some of these cases and decide the motion.

MR. CUNNINGHAM: Whether the Court denies the motion or not, we'll still want McGonigle and Timms here to make a record, a Bill of Exception, to what we would have offered through these two witnesses but for the fact of the Court denying the motion.

[10] THE COURT: I want you to be able to make a Bill on it, a full Bill if necessary.

MR. CUNNINGHAM: To be able to make a Bill we are going to need them.

THE COURT: Whether or not you do it through live testimony or some other method, we can deal with—as I read your subpoena, essentially what you are concerned with is getting the articles themselves.

MR. CUNNINGHAM: The articles themselves should have a list of the cases, and four thousand names. Once we get that, we can move on from them.

THE COURT: Might get some of their source material, but they said that it is a matter of public record. Let me take this matter under advisement, unless you wish to stay. I will not permit your clients to be interviewed or questioned without your presence in Court.

MR. WEST: There is also another subpoena out for another news reporter for the Dallas Morning News, Melinda Hemper.

THE COURT: I am not aware of that subpoena, or Motion To Quash in her behalf.

[11] MR. MC ELHANEY: Your Honor, Mr. West just told me that just now, I wasn't aware of it either. I will contact her. We would like to amend our motion to include her. I understand from Mr. West it is the same grounds, same proffered reason for wanting her.

THE COURT: I don't have any problem, I want to save as much time as possible for both parties, to include any Dal-

las News reporter that participated in this particular motion. What I am saying, Mr. McElhaney, is I have not decided. Obviously, I just want a chance to hear what the motion is about. Let me look at some law and look at Bransburg, some of those cases. So, you are excused. You are welcome to stay if you want, but before I do anything I will contact you and let you know.

MR. MC ELHANEY: Thank you., Just one. matter; the Supreme Court cases in the cases in this area tend to be very lengthy. I know the Court has severe time constraints. To sum it up, I would say the xerox copy of the case opinion attached to our brief although a civil case, nevertheless, cites the rules that we **[12]** believe are also applicable here. And so, just for the Court's convenience, this opinion that is attached to the brief I think is -would give the Court the outline of our argument.

THE COURT: I appreciate the help. Mr. Cunningham, are you going to say something else?

MR. CUNNINGHAM: Since the Court was taking it under advisement I wanted to know whether or not Mr. McElhaney and his clients were going to be under the gag rule also?

THE COURT: The gag rule ran to the parties, I am not going to prevent the press from airing stories about this hearing. Does that answer your question? I was concerned the gag order was more directed at the lawyers in the case at the time than the newspapers. I am not going to do that.

MR. CUNNINGHAM: Wouldn't you consider they are now parties, having filed a motion? And they are seeking to quash their having to testify in this case and possibly any evidence being offered through them.

THE COURT: I won't extend it to them.

[13] MR. CUNNINGHAM: Well, to that extent then, we would then invoke the Rule.

THE COURT: I am going to deny that.

MR. CUNNINGHAM: The Court denied that?

THE COURT: As regards to newspaper people.

MR. CUNNINGHAM: Not newspaper people, just anybody from the Dallas Morning News: Timms, McGonigle.

THE COURT: Anyone that's been subpoenaed, I will honor the Rule on that.

MR. WEST: Your Honor, the tenor of our request to invoke the Rule is that potential witnesses not be allowed to discuss this matter with anyone else, as the Rule has been invoked in other criminal cases, same thing.

THE COURT: Now, I am ready to take up the next motion. Motion To Dismiss or To Quash the Indictment and/or Select A Separate Jury. Is that a fair summation of that? Who would you like to call on that?

MR. KINNE: Your Honor, the Court -before the Defense is allowed to call any witnesses, may I be heard with regards to this particular motion?

[14] THE COURT: Surely.

MR. KINNE: The Motion To Dismiss The Indictment, I submit that it is untimely filed pursuant to article 28.01 of the Texas Code of Criminal Procedure; number one. Number two; as I understand the motion, it prays that the Court order the selection of two juries in this case; which remedy the Court could not grant if he wanted to. And a Motion To Quash The Indictment because article 37.01 of the Texas Code of Criminal Procedure is unconstitutional. We feel that that section of the motion does not require testimony. The Court can determine at this point in time, as has previously been determined by higher Courts, that the particular article of the Code of Criminal Procedure is constitutional. Since the Court could not grant the relief prayed for by the Defense, I feel that hearing testimony on a motion which the Court could in no way grant is a waste of everybody's time; hearing things that the Court couldn't do if the Court wanted to. And, therefore, we would urge the Court to deny this particular motion.

THE COURT: Actually, I have two **[15]** motions on it, Mr. Cunningham.

MR. CUNNINGHAM: There are two motions.

MR. KINNE: I thought the Court was addressing that motion.

THE COURT: I have got one to dismiss the indictment and one to quash the indictment. Are they the same motion?

MR. CUNNINGHAM: Separate motions.

MR. KINNE: I thought the Court said we are going to take up the Motion To Quash The Indictment and Be Allowed To Select a Separate Jury.

THE COURT: Tell me what you want.

MR. KINNE: With regard to the Motion To Quash The Indictment For Systematic Exclusion Of Classes From The General Venire, again Your Honor, this motion is most certainly untimely filed pursuant to article 28.01 of the Code of Criminal Procedure. And again, the Court has previously ruled on the Defense's motion with regards to the selection of the jury, with regards to quashing this particular jury. The remedy prayed for by the Defense is that the Court quash the indictment should the Court find that classes of people **[16]** have been excluded from the jury; which again, the Court would have no authority or jurisdiction to quash an indictment returned by a Grand Jury based upon those grounds even if the Court should find there was any truth to it whatsoever. And we feel, again, that we are wasting time on a useless matter that the Court couldn't grant if he wanted to. And if they have objections to the composition of the jury, certainly, they can make motions subsequent to trial and protect the record in that manner. We submit that the Court could not grant the motion, and that it is made for a delay of time and for possible political motivations. We would urge the Court to deny both motions at this time.

THE COURT: Mr. Cunningham, do you want to reply?

MR. CUNNINGHAM: Your Honor, I am getting tired of hearing about political motivations.

MR. KINNE: I don't care what you are getting tired of.

MR. CUNNINGHAM: I did not interrupt Mr. Kinne when he was making his speech of gobbledy **[17]** gook and nothing.

MR. KINNE: Object to Mr. Cunningham's interpretation of gobbledygook and nothing. I didn't insult him.

MR. CUNNINGHAM: Mr. Kinne knows I am not running for office, my concern is Thomas Joe Miller-El, the man to my immediate left, that the State has said they are actively seeking the death penalty on. Anything within the rules of criminal procedure or the penal code that I can do to protect Mr. Miller-El's rights, I am going to do whether Mr. Kinne likes it or not.

MR. KINNE: Excuse me, Your Honor, I would like to object to Mr. Cunningham's statement. If he wants to respond to me that's fine, but if he wants to quarrel with me I have to object to it at this point in time.

MR. CUNNINGHAM: I am addressing myself to the Motion To Quash The Indictment Based on the Systematic Exclusion Of Classes From General Venire. The prayer prays that the jury be quashed and that a new jury be selected to try the case, free of violations **[18]** of the sixth amendment right. He prays for such other, further relief, on the premises that this Court may deem proper. There is nothing in the prayer about quashing the indictment.

THE COURT: All right. I took that maybe—that was my question, Mr. Cunningham. I asked this question because assuming that, you know, if you can prove the allegations to the motion I don't think the Court has any more power under that theory of law to quash the indictment because, maybe the jury, but not the indictment. Is that what you are saying?

MR. CUNNINGHAM: I am attacking the jury, the twelve that have been seated, that we say are tainted by the use of the State having used its peremptory strikes in a discriminatory manner by striking ten blacks that were qualified, ten of their fourteen strikes being for blacks. That's

what we are concerned with that the Court can still address itself to.

THE COURT: Go ahead.

MR. CUNNINGHAM: Because if the Court **[19]** finds, after a hearing based upon the evidence, that if that occurred then the Court has the power to say that this jury selected has been tainted, therefore, I am going to dismiss this jury and start picking a new one. That's what we are asking for.

THE COURT: Okay, I am with you.

MR. CUNNINGHAM: That's what we want offer evidence on.

THE COURT: Mr. Kinne, I think you may have answered that, so we narrow—I think the only issue I really have in front of me is whether or not they would be entitled to have an evidentiary hearing on the Motion To Quash The Jury that's been selected and sworn individually, at least at this point in time, on the basis of some sort of racial exclusion, or however you want to characterize it. I don't have any authority to grant a Motion To Quash The Indictment at this point in time. We had extensive pre-trial before the trial started on both motions, so—or motions I should say. But on this one, Mr. Kinne, is—what is your position about the Defense being allowed to bring a defense, if it has any, to **[20]** show that the State has some sort—

MR. CUNNINGHAM: While he is looking at it; the Court when we had the other pre-trial also told counsel for Mr. Miller-El that we would have the opportunity to file any other motions and you would rule on it.

THE COURT: I think the time to quash the indictment, though, I think that was a misheading; I will treat it like that. I am not going to quash the indictment based on impropriety in the jury selection, if there was any. Mr. Kinne, on the question they raised about alleging the State in some form or fashion was discriminatory in jury selection, I don't see any—How do you answer that?

MR. KINNE: I'm sorry, I was thrown off by Mr. Cunningham's motion, which is entitled Motion To Quash Indictment, but prays for some other relief with regards—I believe the Court has already ruled on the composition of the jury. And, again, the witnesses that have been subpoenaed by the Defense, as far as I know, had nothing to do with the selection of this jury for the State of Texas or for the **[21]** Defense. I fail to see how Judges sitting in other courts and some former Assistant District Attorneys who were in the District Attorney's office many years ago—And, again, none of these people have had anything to do with the selection of the jury in this case, since the people who had anything to do with the selection of the jury have been here before the Court for the last five weeks; that being the Defense Counsel, Mr. Nelson, Mr. Macaluso and myself. None of the witnesses they have subpoenaed had anything whatsoever to do with the selection of the jury. And we submit that, again, this testimony with regards to what may have happened somewhere else in some other case has nothing to do with the selection of the jury in this case. And we would further urge the Court that this is merely for delay. That the State has at great expense brought witnesses in, from not only out of town but out of state, in anticipation that we would be proceeding to trial in this matter. And we feel that the Court has already ruled on the composition of the jury, and we would urge the Court to deny the motion **[22]** and proceed to trial.

THE COURT: Mr. Cunningham, I am prepared to rule on your motion, but I think I can note something if the lawyers disagree on something. Of course, both sides agreed to excuse certain jurors in voir dire because of the way we agreed to conduct voir dire. Some excused by agreement were blacks, some others were not. Of course, I think the record will show on voir dire, which has been conducted in five weeks as individual jurors were challenged or struck, that the Court—it wasn't necessarily the Court, I guess the lawyers themselves usually made a record of the race of the juror. And the State, as I recall, on every single strike where it was challenged by the Defense they stated to the

satisfaction of the Court at least, that the reason for striking a particular juror was not racially motivated. That is already in the record. What you are proposing to do is go beyond that?

MR. CUNNINGHAM: Yes, sir.

THE COURT: To show what?

MR. CUNNINGHAM: One; to show there was **[23]** a practice and procedure in the District Attorney's office dealing with the striking of minorities, and particularly blacks. That there was printed material, and that that material exists and has existed for a long period of time, possibly up even till now. And that the strikes that were used in this case were a carrying out and a continuation of the policy that was set out in that guideline or instruction to fellow—well, to prosecutors on how to select jurors and who t keep off juries.

THE COURT: Mr. Kinne, I am going to let the Defense try to support its motion. I can't pre-rule on it, but I want the record—maybe I am wrong, but I want the record as clean as possible. If it goes up, I don't want some Court back down the line to conduct a hearing post-trial, I had rather have the record be complete. So, if there is a viable issue here to be judged properly on appeal, Mr. Cunningham; I don't want to make this, as you might well suspect, a long matter because I just happen to know some of the people that have been subpoenaed are trial Judges in this **[24]** courthouse and other people. They all have busy schedules, but I am going to stop talking and ask you to call your witnesses.

MR. CUNNINGHAM: Call Judge John Sparling.

THE COURT: We'll limit this to issues in the motion. I don't want you to get off track.

MR. CUNNINGHAM: May we approach the Bench, Your Honor? (The following proceedings were held at the side of the Bench.)

MR. CUNNINGHAM: You said you didn't want us to get off track, I don't know what you mean by getting off

track. My motion is—my concern is Miller-El's rights and to have a fair and impartial trial.

THE COURT: That's all I am concerned with.

MR. CUNNINGHAM: If any of his Constitutional Rights are involved I am going to do everything I can to protect them. The Court said "get off track," I don't know what **[25]** you are talking about, I need to know.

THE COURT: Stay within the outline of the motion, what this witness may or may not know in support of the motion. Do we have more witnesses?

MR. WEST: Before we go back outside, I think for record purposes; if for any particular reason that any party in this case thinks this is politically motivated, I will withdraw as attorney in this particular case.

THE COURT: The Court doesn't think that.

MR. CUNNINGHAM: It is being said.

THE COURT: Well, I hope not.

MR. KINNE: And I will say it again.

THE COURT: On the record. Go ahead, Mr. Cunningham. (The following proceedings were held in open court.)

JOHN SPARLING,

the witness, having been duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

[26] DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name.

A. John Sparling.

Q. And what is your occupation or profession?

A. I am an attorney.

Q. And how long have you been practicing?

A. Nineteen years, approximately.

Q. You are a former Court of Appeals Judge?

A. That's correct.

Q. And you resigned a month or so ago?

A. About two months ago; that's correct.

Q. Were you ever employed by the Dallas District Attorney's office?

A. I was.

Q. When were you first employed by the Dallas County District Attorney's office?

A. February 1st, 1968.

Q. And would you kind of tell me what positions or jobs you had with the Dallas County District Attorney's office?

A. Well, I was hired as an Assistant District Attorney. I was assigned to Judge Gutherie's misdemeanor **[27]** court as most trial—most prosecutors assigned to the trial division. I started out as third man in misdemeanor court, and went to second man, and headed up misdemeanor court.

I was promoted to a felony court, and was in two or three different felony courts, and eventually became Chief Prosecutor of a felony court.

I then helped establish what was then called the impact program, which was a—which were monies that were given by the Federal Government to the City of Dallas, and in turn were given to the County of Dallas in order to create sort of visiting courtrooms to combat crime on the streets. Subsequent to that, or during that period of time, I moved from one court to another trying a variety of different cases.

In 1973, I helped write a grant called the Specialized Crime Division and started a unit called. the. Specialized Crime Division. And I remained head of that division until September 1981, at which time I left the Dallas County District Attorney's office.

Q. While with the Dallas County District Attorney's office, did you have an occasion to write an article entitled Jury Selection In A Criminal Case?

A. I am not entirely sure that I put that title on it, but that's how it is known today. Yes, I wrote it.

[28] Q. Do you remember what title you put on it when you wrote it, if any?

A. I believe it was untitled.

Q. Would you tell me who asked—well, first of all, did someone ask you to write the article?

A. Yes.

Q. Would you tell me who asked you to write the article?

A. I wish I could remember. I know it was not Henry Wade, and I don't recall who it was, but I know that it was someone higher in the District Attorney's office than was I.

Q. In other words, someone higher than you, but less than Mr. Wade himself?

A. I would have remembered it if it had been Wade, and it wasn't.

Q. As a result of one—well, strike that. Would the person that asked you to write this article have been your superior?

A. Sure.

Q. As a result of one of your superiors asking you to write the article, you did so; is that correct?

A. I did.

Q. Okay. Did the person that asked you to write the article give you any ideas of what he wanted in the **[29]** article pertaining to jury selection?

A. No. You call it an article, and I might want to—

Q. What would you call it?

A. Well, it began as a handout. That was back—way back then there were Saturday morning sessions where some of the felony prosecutors would lecture some of the misdemeanor prosecutors. And I was asked to speak on jury selection, and I was told about a week prior to the time that I was to give my talk that I had to have a handout. So, I think one Sunday afternoon, or one afternoon, I recall, at

home I sat down and wrote out the document that you probably are holding in your hand today.

Q. Now, this handout as you called it, who was it distributed to?

A. It was at that time given to misdemeanor prosecutors in the Dallas County District Attorney's office .

Q. Can you tell me when you first prepared this handout?

A. It was in 1969.

Q. Okay. And was it was a handout that was subsequently given to felony prosecutors?

A. I can—Whether it was given to felony prosecutors I don't know. Let me say this; that I had no **[30]** great pride of authorship, I did it because I had to. I didn't want to do it at the time simply because it meant more trouble. I was not paid to do it, and I did not do it on the District Attorney's time. I pretty much lost track of it until it became an item.

Q. Did the hand out of handbook that you wrote become a subsequent part of a larger manual?

A. Yes.

Q. So, that the handout that you wrote, not on the District Attorney's time but was given at out at least to misdemeanor prosecutors, was subsequently included as a part of a larger manual for persons employed by the Dallas County District Attorney's office?

A. I didn't—As a matter of fact, it was included in a statewide manual for criminal defense lawyers with a notation that it added something to jurisprudence.

MR. CUNNINGHAM: May I approach the witness, Your Honor?

THE COURT: Surely.

(An item was marked as Defendant's Exhibit No. 1 for the purposes of identification.)

Q. Judge Sparling, I show you what's been marked **[31]** as Defendant's Exhibit No. 1. And I'll ask you whether or not—well, have you had an opportunity to look at that?

A. Well, let me—I have had a chance to—Let it this way: I have not looked at it to make sure each page was stapled in sequence, it starts at page 301 and ends on page 318; it appears to be.

Q. The handout that you prepared that is now a part of a much larger manual?

A. I don't know what it is today.

Q. All you know, probably—

A. I do not—I do not think it is part of anything that is currently circulated to anybody today.

MR. CUNNINGHAM: Offer Defendant's Exhibit 1.

MR. KINNE: We'll object that Judge Sparling's article written in 1969 is hardly relevant on material on a jury selection here in March of 1986.

THE COURT: I am going to overrule, not that particular objection. I am going to let it remain part of this record and I am going to determine its relevancy, if any.

Q. (By Mr. Cunningham) Judge Sparling, would you tell me whether or not there are any remarks contained in **[32]** your article that you wrote, that was handed out as a handbook to prosecutors, with respect to how they should handle prospective minority jurors?

A. Yes, I said—Now, your question is slight multifarious. Understand, I did not hand this out; I didn't include this in this manual; nor did I cause its publication. I wrote it one Sunday afternoon and handed it to about fifteen misdemeanor prosecutors.

Q. The manual you wrote one Sunday afternoon in 1969, did it shed any light or give information to prospective prosecutors of what action, if any, they should take with respect to minority jurors; specifically black jurors?

A. I don't see—I am not sure that I ever used the word black, and I am not sure I ever picked out blacks in this thing.

Q. Did you use the word minority?

A. I did use the word minority. I understand you have one man on your jury which would be a minority, wouldn't it?

Q. Maybe. Which one?

A. I'm sorry, what?

Q. Which one?

A. (No response indicated.)

Q. Would you tell the Court what your thinking **[33]** was in 1969 when you wrote the article and passed out the handout with respect to minorities serving on juries?

MR. KINNE: Again, we'll object to what this witness' opinion was in 1969 as being irrelevant and immaterial to this hearing.

MR. CUNNINGHAM: I think I will connect it up, Your Honor.

THE COURT: Go ahead.

A. All I can do is read what I wrote as to what to look for. "You are not looking for any member of a minority group which may subject him to oppression." I meant oppression by the State. "They almost always empathize with the accused." In that same vein, somewhere over here I said—remember, this is 1969.

Q. Uh-huh.

A. I say someplace else in there that minorities tend to empathize with the accused, probably say it twice.

Q. Now, you left the Dallas County District. Attorney's office in what year?

A. In 1981.

Q. Okay. Do you know whether or not there were any updates or any changes in that particular jury selection handout from '69 when you wrote it up until '81?

A. No, I don't.

[34] Q. Okay. And you are not saying that there were not any changes or updates, or whether or not they left it as you wrote it?

A. I don't know. All I know is that it was placed in a manual, and at my request I believe it was taken out.

Q. When you left in 1981, were any of those manuals still in the D.A.'s office and still being used, either by misdemeanor or felony prosecutors?

A. I can't answer that, I don't know.

Q. Is it your belief that the handout that you wrote in 1969, that the reasoning behind that handout has not changed?

A. Well, I think the handout is terribly out of date.

Q. That's not—it may be termed out of date, but are you saying that the underlying reasoning with respect to the selection of juries has not changed from what you wrote in 1969?

A. The reasoning? In what respect, can you be more specific? The underlying reasoning is you don't want to take anybody on a jury, if you are a prosecutor, unless you have—unless you believe that he will convict. That's the underlying reasoning of the entire paper. That has not changed since 1969.

[35] Q. Would a further extension of that be that minorities, because they—you believe they empathize with the defendant, would not convict?

A. No, and I never said that they would not; I said they often empathize with the accused.

Q. Okay.

A. And I am not going to let you back me into any kind of situation that it says or implies systematic exclusion of any group of people was advocated.

Q. Well, what I am concerned with now is whether or not you have said that the paper's underlying reasoning hasn't changed from when you wrote it in '69 to right now, as of February 28, 1986?

A. Is that a question?

Q. Yes, sir.

A. The underlying reasoning of the article on jury selection was to try to select, or actually more accurately, to try to eliminate those persons from your jury that you do not believe will convict, using peremptory challenges.

Q. When you make the statement that you are not looking for a member of a minority group which may subject him to oppression; what type of oppression are you talking about?

A. Well, my attitude was that, in 1969, that **[36]** there were certain, either groups of people that may either actually be, or perceive themselves as being oppressed by the state, being discriminated against. The thought being: If they were, in fact, discriminated against, and if they had, in fact, been oppressed by the state, normally they might take it out against the State. In 1969 things—our world has changed drastically since 1969. I don't need to tell you that. But there was a lot going on in 1969 that is not going on in 1981 or 1986.

Q. So, you are saying that if a minority felt that he had been oppressed by the system, then he was not—or you should not look for that type of person on the jury.

A. Let's say that if a white Anglo-Saxon male felt he had been oppressed by the system, you wouldn't want him either.

Q. But I don't see where you said that you are not looking for any member of a white Anglo-Saxon male who had been oppressed, you said minority.

A. That's right and—is that a question?

Q. Yes, sir.

A. Yes, I did say minority. I mean, you are reading it. am delighted to have you read it if you want.

Q. I am still trying to find out what you mean **[37]** when you say "subject him in oppression". Who's going to oppress him—

A. If you don't understand it, a great lawyer like you, I am not sure anybody else could have understood it either. That would make it pretty meaningless.

Q. I don't think it would be pretty meaningless. Probably somebody could interpret it any way they wanted, like in the District Attorney's office.

MR. KINNE: Excuse me, Your Honor, is that a question?

MR. CUNNINGHAM: It is a comment.

MR. KINNE: Could we have a question and not just a conversation between Mr. Cunningham and Mr. Sparling?

THE COURT: Let's move on. Anything else, Mr. Cunningham?

MR. CUNNINGHAM: Just a minute, Your Honor.

Q. (By Mr. Cunningham) Judge Sparling, you are aware that the Civil Rights Act of—well, the Civil Rights Act was passed in 1964?

A. Which one?

Q. The first one.

A. There's a Civil Rights Act of 1983. There are, oh, a whole bunch of them.

[38] Q. The Civil Rights Act of 1964.

A. I can't agree with you that was the first one, Mr. Cunningham.

Q. Was there a Civil Rights Act passed in 1964?

A. I don't know.

Q. When you wrote your article five years later and you referred to the word "minority group," what minority groups were you speaking of?

A. I don't recall.

Q. You had no particular minority group in mind?

A. I think any group that felt that they had been as a group oppressed against. And don't ask me to, seventeen years later, to try to interpret it.

Q. Were you talking about Negroes? Were you talking about Mexican-Americans in '69? I don't think we had any Vietnamese here. All that—were you primarily talking about Negroes and Mexican-Americans in 1969 when you referred to minorities?

A. No, I don't think I was, primarily.

Q. When you talk about race, were you referring to Negroes or Mexican-Americans?

A. I am not sure that's what was in my mind. I understand, you know—

Q. Well, let me read it. It says race, "Minority races almost always empathize with the defendant." Were **[39]** you talking about Negroes, Mexican-Americans?

A. Possibly, yes.

Q. Were there any Negroes in the District Attorney's office in 1969 when you wrote the article?

A. I don't even remember.

Q. What about Mexican-Americans?

A. Yes.

Q. Do you remember what his name was?

A. I think Sef Dominques was a prosecutor then.

Q. Do you know the names of any white prosecutors who were in the District Attorney's office, at the time that you wrote the article, that are still there? Was Norman Kinne there?

A. No, I don't think so,

Q. What about Paul Macaluso?

A. No. I'm sorry, I am not sure when they came to the District Attorney's office. I know that I was there before they were.

Q. Did either Paul Macaluso or Norm Kinne ever serve under your supervision?

A. No.

MR. CUNNINGHAM: Pass the juror. I mean, pass the witness.

THE COURT: Mr. Kinne, any questions?

MR. KINNE: Yes, sir.

[40] CROSS EXAMINATION

BY MR. KINNE:

Q. Mr.—excuse me. Judge Sparling, in 19—let's see, you came to work for the D.A.'s office in February of 1968. In 1969, when this article was written, do you recall what your position was in the D.A.'s office at that time?

A. I do not recall exactly, I was not one of the heavyweights.

Q. I presume—were you in felony court?

A. Yes, I was.

Q. All right. And this paper was primarily written for misdemeanor prosecutors?

A. Yes, sir.

Q. Misdemeanor prosecutors don't try death penalty offenses, do they?

A. No.

Q. Didn't in 1969?

A. No, that was not directed to anything, it was not directed to any capital-type offense.

Q. This paper that Mr. Cunningham has put into evidence then, the quotations that he has asked you about, were never intended to apply to jury selection in a capital **[41]** offense; is that correct?

A. No. That's correct.

Q. In 1969, or from the time that you went to work with the District Attorney's office from 1968 to 1981, was there ever a systematic exclusion of individuals because they belonged to a particular race, religion or minority?

A. No.

Q. Did you ever teach that, or did you ever hear anybody in the D.A.'s office teaching that?

A. No.

Q. You indicated that things have changed since 1969, and I believe you have partially explained that; is there anything else that you would like to say about that?

A. Well, just simply that, just to point out the fact that times do change, people change and ideas change. And what was the—what I may have believed to be the contemporary wisdom of the day is not necessarily the contemporary wisdom of today. And I would be delighted if everybody would put that paper in the context of 1969, which is the time it was written.

Q. Just a couple of final questions. Judge, let me ask you: Did you have anything whatsoever to do with the selection of the jury in this particular case?

A. Not a thing.

[42] MR. KINNE: I believe that's all.

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Judge Sparling, you indicated that this was written for misdemeanor prosecutors.

A. Yes.

Q. And after you had written it and you had given it out to the misdemeanor prosecutors, I believe you said that it was subsequently incorporated in a manual for prosecutors?

A. Uh-huh, that's correct.

Q. Was the manual limited to misdemeanor prosecutors only? Yes or no, sir.

A. There may be a third answer, which is I don't know.

Q. Okay. Are you saying you don't know?

A. Yeah, that's what I am saying. I had absolutely nothing to do with the placing of that article in a manual. Nobody asked me about it, nobody asked my approval of it, it was done. And I don't blame the person that did it, it was just done.

Q. Let me see if this is correct: You were directed by one of your superiors to write the article?

[43] A. As a handout; that's correct.

Q. As a handout it was handed out initially to misdemeanor prosecutors?

A. That's correct.

Q. And after that someone thought that the article was well written enough, or contained the thoughts of the office, or at least the superiors who asked you to write it, that it was incorporated in a manual?

MR. KINNE: We'll object to what someone else may have thought, Your Honor.

THE COURT: I will sustain the objection to that particular question, Mr. Cunningham.

Q. (By Mr. Cunningham) As a result of your having written the article it was incorporated in a manual by someone else; is that correct, sir? .

A. That's correct.

Q. And as it is incorporated in the manual it is referred to as "Jury Selection In A Criminal Case"; is that correct, sir, as it is entitled here starting on page 301?

A. That's your exhibit, if it is in evidence. If that's what it says, that's what it says.

Q. Okay, sir. You also told Mr. Kinne there has been no systematic exclusion of either classes or minorities from juries in Dallas County?

[44] A. That's correct.

Q. And you base that upon what, sir?

A. On my thirteen, almost thirteen years experience in the District Attorney's office, knowing other District Attorneys and watching them pick juries, hearing them talk.

Q Let me see, you say you spent thirteen years in the District Attorneys office; how many capital murder cases did you try?

A. Thirteen, eleven, somewhere in there; eleven, thirteen.

Q. Out of those eleven or thirteen capital murder cases that you tried, how many blacks was on either one, or two, or all eleven or thirteen?

A. I just don't have any idea, but I would be surprised if there were not blacks on all of them.

Q. Do you know the names of any of them? Can you give us the names of any of the cases?

A. I can give you the names of some of the defendants let me ask you—do you want the names of some of the jurors, the black jurors?

Q. No, the defendants, I want the names of defendants because then I can go to the files and I can find out whether or not there were black jurors on those juries.

[45] A. Well, I have—I mean, I have somewhere the files on the cases that I am in reference to, but I don't have all the names in my head. But I am not sure, really, what you are driving at.

Q. Well, you have made the statement that there has been no systematic exclusion of minorities from juries, and particularly capital murder juries. I think you said that on all of yours there were one or more blacks and I want to see it.

A. I think I said I would be surprised if there were not one or more blacks on all of them.

Q. In other words, one?

A. Brice, I do not remember some of the names. Some—if some of the people I tried for death and got it walked through that door right now, I am not sure I would recognize them. And you are asking me to go back eighteen years, or seventeen years, and try to tell you how many blacks were on the jury, what the makeup was. It wasn't that big a deal. If there was a black on the jury, I wasn't—it was not a remarkable event, therefore, I don't remember it.

Q. Do you know Stauffer?

A. Sure.

Q. Was he an Assistant District Attorney in the District Attorney's office while you were there?

[46] A. Yes.

Q. Did he come after you, or before you?

A. Before.

Q. And was he still in the District Attorney's office when you left?

A. No.

Q. Okay. Prior to the—you said John came before you or after you?

A. He came before I did.

Q. Have you—do you know whether or not Stauffer was the first felony prosecutor that put a black on a capital murder case?

A. No, I don't.

Q. I believe you said the reason that you know there is no systematic exclusion is; one, you didn't do it. Is that what you are saying?

A. Absolutely.

Q. And then other prosecutors told you that they did not?

A. Well, yes, other prosecutors have told me that; that's correct.

Q. Are there any other means by which you can say that there were no exclusions of minorities from participating in felony juries, and particularly capital murder juries, other than your experience and what other **[47]** prosecutors told you?

A. In other words, can I testify to something other than what I have seen and what I know? I cannot.

Q. Were you ever—well, did any prosecutor ever indicate to you that he did not want blacks on felony juries or capital murder juries?

A. No.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Mr. Kinne, anything else?

MR. KINNE: Yes, sir.

RECROSS EXAMINATION

BY MR. KINNE:

Q. Just for the record, Judge Sparling, you are presently a Republican candidate for District Attorney; is that correct?

A. Very much so.

Q. One of the Defense Attorneys over here, Mr. West, Royce West, is a Democratic candidate for District Attorney; is that correct?

A. As I understand it very much so.

MR. WEST: Your Honor, as I have told **[48]** the Court, Mr. Kinne and the whole world: If Mr. Kinne or anyone else thinks this is politically motivated, I will withdraw from this particular case. The paramount—I am sitting in as a second to Mr. Cunningham—is the Constitutional rights of Thomas Joe Miller-El.

THE COURT: Anything else?

MR. WEST: Judge, do you want to rule on my Motion To Withdraw?

THE COURT: Oh, that is a motion?

MR. WEST: That's the motion. If the Court or anyone else thinks this is a political grandstand as opposed to safeguarding this man's rights, then I will withdraw from this particular case. I will now tender—

THE COURT: No one asked that you withdraw from the case, I am not going to ask you to. If that's a motion on your behalf, I deny it. The Court always presumes the lawyers do whatever they do for the benefit of their respective sides, excluding exercising peremptory challenges. By the way, is there anything else?

[49] MR. KINNE: No further questions.

THE COURT: Mr. Cunningham, is the witness excused?

(A document was marked as Defendant's Exhibit No. 2 for the purposes of identification.)

FURTHER REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Judge Sparling, I show you what's been marked as Defendant's Exhibit No. 2, and direct your attention to what purports to be a quote with respect to Defendant's Exhibit No. 1. I will ask you whether or not that quote was made by you?

A. Yeah, I anticipated this probably less than 5 minutes ago. The paper's underlying reasoning has not changed. The underlying reasoning is: Do not take a juror that cannot convict.

MR. CUNNINGHAM: I offer Defendant's No. 2.

(A document was marked as Defendant's Exhibit No. 3 for the purposes of **[50]** identification.)

MR. KINNE: On the basis of one line which Mr.—which the witness has said that he said the underlying reasoning hasn't changed, we'll object to Defendant's Exhibit No. 2, in that it contains a great deal more than that; which is hearsay as far as we are concerned.

THE COURT: I will admit that particular part of that article.

Q. Defendant's Exhibit No. 3, I think which contains your picture and remarks made by you. Well, first of all, is your picture shown on page 28A of the Dallas Morning News, March 9, 1986.

A. Sure is.

Q. Does it contain remarks made by you pertaining to he jury selection process in Dallas County, and particularly with respect to Defendant's Exhibit No. 2 and—I mean, No. 1?

A. The—it contains statements made by me to a newspaper reporter.

Q. Okay. Those statements were accurately contained in the paper as you told the newspaper reporter; is that correct?

[51] A. Yes. Are you—maybe nobody else knows what we are talking about. But do you and I agree we are talking about the statements underneath the picture?

Q. Yeah, and also let me find your remarks.

MR. KINNE: Excuse me, Your Honor. I believe if he has some statement and he would like to ask the Judge if he made that statement, I think that would be the evidence. If the Judge says that he said it, then says it now, then that's the evidence.

THE COURT: I believe that's correct, Mr. Kinne. Go ahead, Mr. Cunningham.

A. Right. Would you repeat your question again, please?

Q. There are statements contained on 28A which would be, I don't know, about the fifteenth or twentieth paragraph down, refers to a speech by you, and it goes on for about three or four paragraphs. Is that correct?

A. That's correct.

Q. Was that accurately—were those statements made by you?

A. Yes, they were.

MR. CUNNINGHAM: I offer Defendant's Exhibit No. 3.

[52] THE COURT: Same objection, Mr. Kinne?

MR. KINNE: We'll, yes, sir, he is offering what appears to be a whole newspaper. The Judge has identified a few lines, I take it, of what he said.

THE COURT: Again, I am not sure what purpose it serves, but I will admit that portion of the article which Judge Sparling—

MR. KINNE: He said—but he didn't say it was inconsistent with what he's testified to today. How are we to know what part that is?

MR. CUNNINGHAM: I will point that out for him, Your Honor. Oh, you want to know right this minute?

THE COURT: Get it in the record.

MR. KINNE: May I have the witness on voir dire, Your Honor?

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. KINNE:

Q. Judge, is the part that you and Mr. Cunningham [53] were having a somewhat confidential conversation about; would you mind reading the part that has been attributed to you, that you say that you did say to the newspapers?

A. Yes. It says, "Sparling, now a Republican candidate for District Attorney, said his speech merely reiterated, quote, the conventional wisdom of the times. He no longer believes the guidelines are valid." Quote, "I do not see there's a good reason, and I don't think there has ever been a good reason, to exclude blacks," Sparling said last week.

MR. CUNNINGHAM: Judge, I think two paragraphs above that, that you did not read and Mr. Kinne did not ask you to read; would you read those two also?

MR. KINNE: If that's what you said. I don't want him reading some part of the newspapers, I am interested in what in the heck he's offered into evidence. I asked the Judge what part of that newspaper he agrees he said.

CONTINUED REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Would you agree you said the two paragraphs I [54] was just talking to, immediately above the two that you just read?

A. Said to the newspaper reporter?

Q. The speech by then Assistant District Attorney John Sparling.

A. That is contained in your Defense Exhibit there.

Q. Go ahead, because the next down it is—

A. The only thing I said that is not already in evidence is what I just read.

Q. Well, Mr. Sparling asked you to read two paragraphs.

A. Mr. Kinne.

Q. I'm sorry, Mr. Kinne asked you to read the two bottom paragraphs, I want you to read the two immediately before then, which are concerned with remarks made by you about the issue that we have been talking about.

A. "The speech by then Assistant District Attorney John Sparling noted that minorities, quote, almost always empathize with the accused, therefore, do not make good jurors for the prosecution." Let me back up to—for a minute. I did not say, "Therefore, do not make good jurors for the prosecution." I said, quote, "Almost always empathize with the accused," close quote. That's the extent of what I said.

[55] Q. In other words, you are saying that you did not tell the reporter, "Therefore, do not make good jurors for the prosecution"?

A. I did not tell the reporter that.

Q. The next paragraph.

A. Quote, "You are not looking for a fair juror," that's in quotes, Sparling advised. And there's, quote, "Rather a strong bias sometimes in a hypocritical individual who believes defendants are different from them in kind rather than degree," close quote.

Q. That was your belief as of probably March 7 or March 8, 1986, when you made that statement to the reporter?

A. No, Mr. Cunningham, I think you are confused, they took that out of the jury selection paper that is on your counsel table. that was written in 1969.

Q. Okay.

A. What I said to the reporter was the first thing I said in answer to Mr. Kinne's question; that the conventional wisdom of the time that—that the speech merely reiterated the conventional wisdom of the time, and that I don't see there's any good reason, there's never been any good reason to systematically exclude blacks. That's what I said in 1986.

Q. When did you make this statement?

[56] MR. KINNE: Which statement?

Q. Okay. You are not looking for a fair juror?

A. I said that in 1969.

Q. Anyone reading article would not know that you said that in 1969; is that correct?

A. But I can't be held accountable for that, Mr. Cunningham.

Q. Just being honest and fair, if someone picked up this paper tomorrow and read that statement they would not know that you are talking about something that you wrote back in 1969? Isn't that true, sir?

A. I couldn't—I can't speak to what a reader of the newspapers is going to assume or not assume. But understand, when we talk about a fair juror, that was not a comment that a fair juror couldn't be had. A fair jury, a fair juror and fair juries come out in the wash, that was the sentence's meaning behind that in 1969.

Q. I get the impression from what you said that you advised that you were looking for a strong, biased, sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree.

A. From the perspective of a prosecutor trying to convict, that's correct.

MR. CUNNINGHAM: That's all, Your **[57]** Honor.

THE COURT: Anything else, Mr. Kinne?

MR. KINNE: That's all.

THE COURT: Thank you, Judge, you will be excused.

Mr. Cunningham, do you have anybody here right now? I am going to work as long as possible, but my reporter might rest her fingers for a few moments. Do you have somebody to testify right now?

MR. CUNNINGHAM: We asked Judge Hampton to come down.

THE COURT: Is he not outside the room? Mr. Cunningham, who will you have next?

MR. CUNNINGHAM: The Honorable Jack Hampton.

THE COURT: Okay, Judge Hampton.

JACK HAMPTON,

having been sworn as a witness to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

[58] BY MR. CUNNINGHAM:

Q. Go ahead, state your name.

A. Jack Hampton.

Q. And are you employed, sir?

A. Yes, sir.

Q. Where are you employed?

A. Judge of the 283rd District Court.

Q. How long have you been employed as the Judge of the 283rd Judicial District Court of Dallas County, Texas?

A. Since June 1st 1981.

Q. Prior to June 1st 1981, were you engaged in private practice?

A. I was, yeah.

Q. How long were you engaged in private practice?

A. Nineteen years.

Q. Before going out in private practice were you employed by anyone else?

A. I was employed by Henry Wade, District Attorney, for five years.

Q. And can you briefly recall what jobs you held; i.e., whether or not--I assume you started in misdemeanor court?

A. Yes, I did.

[59] Q. Okay. Did you work your way up from the misdemeanor court?

A. I did, uh-huh.

Q. What was the highest, I guess, rank that you attained while in the District Attorney's office? Did you make felony prosecutor?

A. I was a felony prosecutor in the Criminal District Courts for two years, 19—last of 1960 through the first half of '62. And I guess—well, now it would be called the number two position is what I had.

Q. I will ask you whether or not, while you were serving as a felony prosecutor, you were ever reprimanded by the District Attorney of Dallas County, Texas because you had allowed a black woman to serve as a juror.

A. I was not a felony prosecutor at that time I was misdemeanor.

Q. Misdemeanor?

A. A misdemeanor prosecutor.

Q. That's even—well, were you ever reprimanded by the District Attorney of Dallas County, Texas for allowing a black woman to serve as a misdemeanor juror on a misdemeanor drunken driving case?

A. Either Mr.—the District Attorney or his first assistant, James K. Allen, at the time.

Q. So, either Mr. Wade or the number one first [60] assistant James K. Allen reprimanded you for having put a black female on a misdemeanor DWI jury?

A. That's true.

Q. Was anything said to you by either Mr. Allen or Mr. Wade about what would happen if you ever put another black on a jury?

A. My recollection is that I would be fired if I did that again.

Q. Did you ever put any—from 1958 through 1962 did you ever put any black, a male or female, on any of your misdemeanor juries or any of your felony juries.

A. Not unless I just ran out of strikes. I could have run out of strikes, but I am not—I don't recall ever having done it; in answer to your question.

Q. In other words, if there were blacks who were in the number that the jury would come out of, say the first thirty-two, and there were blacks in that number, you invariably used your peremptory strikes to strike those blacks? Do you follow my question? Let me back up.

A. Okay.

Q. Say that in 1962, before you left the District Attorney's office you were a felony prosecutor, if at that time you were selecting a jury on a felony case and the panel had qualified, and you knew—you then knew that the **[61]** jury came out of the first thirty-two, your ten strikes plus the Defense's ten strikes.

A. Right.

Q. If there were one or more blacks in the first thirty-two, what do you do as a felony prosecutor for Henry Wade?

A. We usually got them off, used the peremptory challenges.

Q. Do you know whether or not other felony prosecutors—let me back up. Do you know whether or not other misdemeanor prosecutors were doing the same thing that you were doing with respect to getting blacks off of juries when you were in misdemeanor courts?

A. I think we all handled it about the same way, we didn't talk much about it, but from observation that is what happened.

Q. Would the same be true with respect to getting blacks off of felony juries for the couple of years that you were in felony court?

A. The same would be true.

Q. And when a black did not—was not challenged for cause and that cause was sustained, the only other way that you got that black juror off was to peremptorily challenge him?

A. That's the only way.

[62] Q. Do you know whether or not—well, you were in private practice from 1962 through 1981, I will ask you whether or not you had occasions to try any criminal cases during that period of time, sir?

A. Many, many criminal cases.

Q. And can you give us a rough idea of how many criminal cases, felony criminal cases, you may have tried from 1962 through 1981?

A. I just don't know. You know, I tried four or five a year, at least; I guess maybe eighty to a hundred, something like that.

Q. Out of that eighty to a hundred estimation, can you give us an idea of how many black jurors, if any, were actually seated as a part of the jury of the case that you were trying?

A. I just don't have any recollection about that, if there were. There may have been some, but I just can't recall.

Q. Would the number have been small.

A. It would have been small.

Q. Considerably small?

A. Probably, yeah.

Now, you have been on the Bench since '81 through the—

MR. CUNNINGHAM: Pass the witness.

[63] THE COURT: Mr. Kinne, any questions, sir?

MR. KINNE: Yes, sir.

CROSS EXAMINATION

BY MR. KINNE:

Q. Judge, with regards to your being reprimanded about putting a black juror on a misdemeanor panel, you don't now recall whether it was Mr. Wade or James K. Allen?

A. No, I am not sure.

Q. Okay. You were quoted, I believe, in the newspapers as saying Mr. Wade reprimanded you.

A. Yeah, that's—that is the way the quote came out. I probably told Mr. McGonigle it was Mr. Wade. And I have thought about it since, and I am just not sure at this point which one it was, it was a long time ago.

Q. Okay. Are you saying—as I recall the story, it indicated that this one particular juror hung up the jury; is that right?

A. That's right. I remember the trial very clearly, it was as a young prosecutor. The first two or three cases you remember almost personally, I do remember that, uh-huh.

Q. All right. Was—certainly, James Allen **[64]** wasn't trying misdemeanor DWI's?

A. No, none of them were in the court. They were not in the court.

Q. All right. And you recall specifically that he reprimanded you for putting a person on there who was black, or that you put a person on there who hung up the jury?

A. My recollection is it was because I had put a black on there who had hung the jury.

Q. Now, you said that you, as I understand your testimony, that you think that the other prosecutors handled it that way but that you all didn't talk about it?

A. We didn't discuss it much, there may have been some discussion about it. But just from observation when I was working with other prosecutors that's the way we handled the jury selection process.

Q. From your observation?

A. From my observation, yeah.

Q. I take it, then, that you're not telling us that even in 1962 it was the policy of the District Attorney's office to exclude people from juries solely because of their race?

A. I can't say that, huh-uh.

Q. All right. When you were a defense attorney for nineteen years, did you make—you tried criminal **[65]** cases, did you not?

A. Yes, frequently.

Q. And when you selected jurors, as representing the defendant, did you make an effort to put minority people on your jury, as a defense lawyer?

A. I didn't—I mean, I used my peremptory challenges on people I deemed to be State jurors. I assumed the State tried to get the minorities off, that was always—

Q. You would have liked to have had minority representation?

A. Sure, and may have gotten some, I just don't recall any specific cases at this time.

Q. When you walked into a courtroom and you saw the jury panel, is it fair to say that you perked up a bit when you saw numerous minority people on that panel?

A. That's fair to say. That's true.

Q. Because you stood a good possibility of getting these minority people on the jury; is that correct?

A. That's true.

Q. Why would you want them on the jury?

A. Well, I always felt like I had a better chance for acquittal if I had a minority on the panel.

Q. Would you agree with the statement, then, that minorities, certain minorities, tend to empathize with the **[66]** defendant?

A. I would agree with that sometimes. It is not as true now as it used to be, but at the time that I was trying cases I felt that was true.

Q. Of course, you approached the jurors on an individual basis?

A. True.

Q. Is that correct?

A. That's true.

Q. There are certain occupations, for example, that you as a defense attorney or as a prosecutor, just taking an occupation, that you want to approach with caution because certain occupations have a tendency to either be more State's minded or more defense minded?

A. That's true, uh-huh.

Q. From the Defense's point of view, probably, you would approach a North Dallas banker with a great deal of caution as a juror?

A. As a defense lawyer you would want to get them off.

Q. Okay. As a prosecutor, a social worker, probably you want to get them off.

A. That's true.

Q. Is it fair to say, then, that these are all general categories, they aren't set rules, "we are going to **[67]** strike all physicians; we are going to strike all North Dallas bankers; we are going to strike all blacks, all Mexicans, all Orientals," simply because they happen to fit in that category. But they do have a tendency, probably, to empathize with one side or the other, but you are going to approach them with caution?

A. That's right, as a general rule; there are exceptions in every case.

Q. Now, when a defense attorney or a prosecutor says, "What we want is a fair and impartial jury," when talking about jury selection; that's not true, is it?

A. I have never found it to be true, both sides are trying to win the case.

Q. That's right; they're both trying to win. In your experience as both a defense attorney and as a prosecutor, as a prosecutor you want the people on there who are the most prone to convict. Isn't that fair?

A. That's always been my understanding.

Q. As a defense attorney you want people who have more of a tendency to empathize with the defendant, or more prone to not convict?

A. I think that's a defense lawyer's job to do that.

Q. As a result of that, each side having peremptory challenges, the State strikes the people they **[68]** think are the weakest and the Defense strikes the people they think are the strongest. And as a result, you get twelve fair and impartial jurors. Isn't that about right?

A. That's my understanding of how the system is supposed to work, yeah.

Q. Thank you very much.

THE COURT: Mr. Cunningham?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr.—I mean Judge Hampton, I am going to give you some statistics about a person, and would you tell me whether or not you think that person would be more State's minded or Defense minded: An individual who is employed by the U.S. Postal Services—

MR. KINNE: Excuse me. Your Honor, I don't believe that the Judge is qualified as an expert. I feel that is irrelevant and immaterial to the motion that they have; who the Judge would select as a juror as either a prosecutor or a defense attorney, since he had nothing to do with the jury selection in this case and did not make policy with regards to the selection **[69]** of juries in the D.A.'s office.

MR. CUNNINGHAM: Your Honor, I suggest it was opened up by Mr. Kinne's question to him when he asked him about the types of prospective jurors, or prospective

persons, that the State would want and that the defendant would want.

THE COURT: I am going to sustain the objection. I think we can probably ask any of these witnesses how they would do something. We all know jury selection has a lot to do with matters such as eye contact and other matters that occur only between the lawyer and the witness. And this witness, even if he were an expert, and he may well be, a description of a hypothetical juror is not relevant to the motion.

MR. CUNNINGHAM: What I was concerned with was whether or not that type of person, from what he said, would be the type of person he would have wanted while he was a prosecutor, or the type of person he would have wanted when he was a defense counsel.

[70] THE COURT: I am going to sustain the objection only because I suspect this witness could be asked a thousand hypothetical questions. I think we can extend this hearing unnecessarily I understand what you are trying to do and I agree to your approach, but I don't think it is relevant. I will sustain the objection

MR. CUNNINGHAM: Your Honor, note our exception.

Q. (By Mr. Cunningham) Judge Hampton, back when you were told by either Mr. Wade or Mr. Allen that—the incident involving the black female. The statement was not made to you that, "If you put another black female on jury and it hangs up you are fired." That wasn't the statement made to you, was it, sir?

A. No, it is not exactly what it was.

Q. In fact, was the statement made to you, quote "If you ever put another nigger on a jury you are fired?"

A I don't recall the word nigger being used, but it was black probably, but that's the way I recall it.

Q. You understand that back in 1958 through '62 we were not referring to ourselves as black then, that is of recent vogue?

[71] A. I didn't know that, I'm sorry.

Q. I think you indicated—well, back in '58 to '62 is when you were in the District Attorney's office. I think you told Mr. Kinne that when you were in private practice, that if you walked in and saw a panel and you saw minorities that your eyes kind of gleemed. Would you expand on that, why you—I guess, why you felt your eyes gleemed, or why you felt that, or something?

A. Well, you certainly hoped to get minorities on the jury. If you were going to have them on the jury you would have to have enough on the panel so the State could not strike them all. If you had more than ten in the first thirty-two then you had a pretty good shot at getting one on the jury panel. That's why you would be happy about it as a defense lawyer.

Q. Would it also be fair to say that when you walked in, and after you got through examining the panel if there were five in the first thirty-two, you knew what was going to happen to those five? Or you felt sure you knew what was going to happen to those five?

A. You could be pretty sure what was going to happen.

Q. After everybody struck their list what you were pretty sure of had actually happened, those five had been struck. Is that correct, sir?

[72] A. That was usually the case. I am not going to say invariably, but usually, uh-huh.

Q. Thank you, Judge Hampton.

THE COURT: Mr. Kinne?

MR. KINNE: That's all. Thank you.

THE COURT: You can be excused.

LARRY BARAKA,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WEST:

Q. Judge, please state your name.

A. Larry Baraka.

Q. And you are the Judge of Criminal District Court No. 2 here in Dallas County; is that correct?

A. Correct.

Q. How long have you been employed as a Judge there, sir?

A. I—oh, I guess it would be about a year and a couple of months.

Q. Now, how long have you been licensed to **[73]** practice law?

A. Since 1976.

Q. And did you graduate from the University of—

A. Houston, uh-huh.

Q. Upon graduation, did you get a job, or get—become employed by the Dallas County District Attorney's office?

A. Correct.

Q. Okay. When you came to the office, would you please the tell the Court the number of assistants, if you recall, that were in the office?

A. The number of Assistant D.A.'s? Would you—I don't know, ninety. I don't know.

Q. How many black assistants?

A. Myself.

Q. You were the only black assistant?

A. Uh-huh.

Q. Okay. Is it also true that you were the first black to be promoted to the Criminal District Courts, felony courts?

A. Correct.

Q. Do you recall the year that was?

A. Probably '78.

Q. How long did you stay with the District Attorney's office, sir.

[74] A. A little—a little less than two years, probably about short of two months, maybe. I don't know.

Q. Now, while working with the D.A.'s office, did you have occasion to participate in and observe many jury trials?

A. Yes.

Q. Do you have any observations concerning the ethnic composition of those cases?

A. You mean the voir dire panel, or jury panel itself?

Q. The jury panel itself.

A. Specifically?

Q. As far as ethnic composition; black, white et cetera.

A. Well, on occasion there were blacks on the jury. If you mean in terms of did I see more white juries or juries with blacks than what—

Q. Yes, sir.

A. I tended to see more white juries.

Q. Well, as a Criminal District Judge have you had occasion to talk with prosecutors, and exclude prosecutors from your court as a result of systematically excluding blacks?

A. Well, I only had one occasion where I excluded prosecutor from conducting voir dire in my court.

[75] Q. Would you tell the Court the reason that you did that?

A. Well, from observing the voir dire and listening to the responses of the voir dire panel, and seeing about, I guess, maybe ten blacks struck; in my mind I didn't see a just cause for it and my perception was they did it because they were black.

Q. You say "they did it," who did it?

A. The prosecutor.

Q. The prosecutor. And that prosecutor was barred from your court; is that correct?

A. Correct. Well, not barred from my court. He and I worked out an understanding: He could try cases in my

court any time he wanted to. I just advised him that if he chose to practice law in terms of picking juries in the manner that he chose to do, that he could not do it in my court.

Q. Judge Baraka, on Sunday March 9, 1986 you were quoted in the Dallas Morning News by a couple of Morning News reporters. One of the quotes, I will ask you, was it an accurate quote? "I am in shock—and you were quoted in an article dealing with Race Bias Pervades Jury Selection. You were quoted as saying, "I am in shock, I thought things had gotten a lot better but apparently they haven't." Is that an accurate quote?

[76] A. Yes.

Q. What did you mean when you said that, sir?

A. Well, I thought things had improved considerably, from my observations at least, from I would say, at least, 1980. Even in private practice I tended to see blacks sitting on juries more often than I had on previous occasions. Oh, I kind of figured to a degree that that practice, or that systematic practice of excluding blacks had somehow cut down, and as more prosecutors were coming in the attitude was changing.

Q. Do you have an opinion as the to whether or not there's been a systematic exclusion of blacks by the State from juries?

A. I would say in the past, yes.

Q. What is that opinion based on?

A. Observation.

Q. That observation—those observations are based on your experience?

A. I said as a prosecutor having tried cases and as a defense lawyer, and I guess being up here now in terms of watching trials being conducted and voir dire.

Q. That's a very honest answer, isn't it, judge?

A. As honest as I can be.

Q. Is it an accurate quote that you indicated blacks have been so conditioned to be discriminated against **[77]** in

the judicial system that many do not consider jury service as a possibility.

A. From conversations I have had with people. It's been told to me on numerous occasions, of their having been instructed to appear and very few actually believe they will be chosen. That, again, is isolated from the people I talk to, so. . . .

Q. About your opinion: Is there—has there been systematic exclusion of blacks from jury panels by the State? Is that correct; that's based on your past observation as a prosecutor, and as a defense attorney and as a Judge?

A. Past experience, yes.

Q. Okay. Would you tell the Judge—you alluded to the fact earlier that you had a conversation with a prosecutor about what you believed to be systematic exclusion of blacks. Would you tell Judge McDonell when that occurred, what year it occurred?

A. Oh, it occurred last year, I don't really remember.

Q. Not the new year, but in 1985?

A. 1985.

Q. Thank you, Judge.

MR. WEST: No further questions.

THE COURT: Cross examination?

[78] CROSS EXAMINATION

BY MR. KINNE

Q. Judge, when you say systematic exclusion, are you talking about systematic exclusion by individual prosecutors?

A. Yes, individual prosecutors.

Q. Is it not a fact, that in the District Attorney's office there are—Of course, certain hints are given to you as a new lawyer as to how to pick a jury, what to look for in individuals that you put on a jury; is that correct?

A. True. Sometimes, it is not even a question of someone telling you to do this or to do that. You come in and you

just watch people, you give them credit for being more experienced and you just follow their lead.

Q. Okay. And I take it what you are saying, then, is there are individuals that you have worked with in the D.A.'s office who systematically excluded, in this case blacks, from juries?

A. Correct.

Q. You are not telling us that was the policy of the District Attorney's office?

A. Quite honestly, in terms of actual policy for **[79]** instance, where Henry Wade says, "This is what you will do," I honestly can say I never had that happen. But, again, it was so pervasive that on one occasion when I was in the D.A.'s office, that blacks were excluded, and I suggested to the people I was working with I didn't want that to happen anymore. And, quite honestly, it never happened again, to me or—Again, no one even approached me or approached me on that topic. I didn't get any reaction in the sense no one came down on me, or told me I was crazy for wanting to do that. So, I think it was more question of the person handling the cases, themselves, to a degree. But, once again, they're learning from other people though.

Q. You apparently had people working with you that you felt systematically had excluded blacks, and you told them not to do that?

A. I don't think it was even a question of thinking. In the instance that it happened they told me that they did it for that reason.

Q. But you told them don't do that, and as far as you are concerned they quit?

A. I know it never happened again, either if I led the case or picked a jury, blacks were on the juries.

Q. Anybody ever tell you while you were Assistant District Attorney, "Don't put blacks on the jury?"

[80] A. Never.

Q. Incidentally, these prosecutors that you are talking about, that you have reference to; you know of course myself, and Mr. Macaques and Mr. Nelson. Are any of the three of us any of the people you are talking about?

A. I never had any experience working with you guys at all?

Q. All right. Thank you, Judge.

REDIRECT EXAMINATION

BY MR. WEST:

Q. Judge, let's talk about policy, oral and written policy. Do you recall being in the D.A.'s office, in your early years in the D.A.'s office, the oral policy about mustaches?

A. Yes.

Q. Would you tell the Court about that oral policy and some of the exemptions from that policy?

A. Well, quite honestly—

MR. KINNE: Excuse me. Is there a motion having to do with mustaches? If there's not I fail to see—

THE COURT: If there is I am in trouble. I will have to disqualify. **[81]**

A. That wasn't a policy either, that was an individual who had that attitude, that was not a policy of the office because I wore a mustache.

THE COURT: If that was an objection, Mr. Kinne, I am going to sustain it. What does this have to do with—

MR. WEST: Well, Judge, talking about policy. Policy can be written policy or oral policy, we need to explore the types of policy that were handed down.

THE COURT: Mr. West, I am hard pressed to relate that to the motion. I think the motion in hand is very viable and substantial, the one having to do with racial bias. If Mr. Wade had a policy about mustaches I don't see what that relates to in this case.

MR. WEST: Note my exception, Judge.

THE COURT: If it relates to what Judge Baraka's impression was regarding jury selection, I think it is fine, but I think it is probably carrying this far afield. I will sustain the objection.

MR. WEST: Note my exception.

THE COURT: Go ahead.

[82] Q. (By Mr. West) Judge Baraka, did you ever have an occasion to read the handout, or parts of a particular manual dealing with the exclusion of minorities from juries?

A. Yeah, I have seen a manual such as that.

Q. When you were in the District Attorney's office did you see it?

A Correct.

Q. And you joined the D.A.'s office in 1978?

A. '76.

Q. '76. Was that a manual used by new prosecutors?

A. It is a manual that is given to prosecutors who have attended a particular course or seminar; generally, they were new prosecutors, misdemeanors. That's correct.

Q. In 1976?

A. No. I didn't actually go until 1977.

Q. To the D.A.'s office?

A. No, into the courts. The 1976 manual, to the best of my recollection, was the last manual with the particular section you are regarding with race biases. And the manual that I got in 1977, if I am not mistaken, I don't think that was in it.

Q. But those manuals were still available? **[83]**

A. Well, yeah, I saw it. I have seen the '76 manual.

Q. What year did you leave the D.A.'s office?

A. '78.

Q. When you left in 1978, was the manual still widely circulated?

A. Honest to goodness, I don't know, in terms of the '76 manual. I don't know.

MR. WEST: No further questions.

MR. KINNE: That's all.

RALPH TAIT,

having been sworn as a witness to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WEST:

Q. Sir, would you please state your name.

A. Ralph Tait.

Q. And how are you employed?

A. As the Chief Public Defender for Dallas County.

Q. How long have you been so employed? **[84]**

A. Since November of 1983.

Q I'm sorry?

A. November of 1983.

Q. Now, what are the basic jobs and responsibilities of the Chief Public Defender of Dallas County?

A. I direct the activities of attorneys that are assigned to four felony courts. and two misdemeanor courts to represent indigents charged with misdemeanor and felony crimes in Dallas County.

Q. Now, you were quoted in an article that appeared in the Dallas Morning News, that appeared Sunday, March 9, 1986. The subject was, you routinely warn black clients that juries are widely composed of mostly white housewives and red-necks from the suburbs who have very little contact with them; is that correct?

A. That's correct.

Q. Now, what did you base that statement on, sir?

A. That was based on my observation of twenty years of law practice in Dallas County.

Q. Twenty years of law practice and your observations in that twenty years of law practice. Was that as a defense lawyer or a combination of other experiences?

A. No, mostly as a defense lawyer. I spent two **[85]** years as a prosecutor but—

Q. I'm sorry.

A. I spent two years as a prosecutor, but not really based on that experience.

Q. What years were you in the D.A.'s office?

A. 1966 through '68.

Q. '66 through?

A. Through '68.

Q. Okay. Now, would you tell the Court your experiences in the—First of all, were you in misdemeanors and also a felony prosecutor?

A. I was a misdemeanor prosecutor.

Q. Would you tell the Court, based on your experiences as a misdemeanor prosecutor, whether there was any type of unwritten rule concerning excluding blacks?

A. My recollection from those years was that we had, unlike what Boyd's done now, there was no school, or training, or handbook. And we pretty much learned from the lawyers in the court with us. And I recall no office policy as far as excluding blacks. Now, some attorneys felt that was very—some D.A's felt that was very important, but in '66 through '68 you did not see many black people on jury panels.

Q. You said some D.A's thought that was very important? **[86]**

A. Back then, yes.

Q. What do you mean when you say "thought it was very important"?

A. It was important to exclude blacks from juries.

Q. Okay. Was that carried out during those particular year, blacks being excluded from the jury?

A. I can't speak for the whole office, and again I cannot recall trials that I was specifically in where—I can recall no trial that I was specifically in that I was asked, or told to do that, from my D.A.'s experience. That's why I say my experience from the D.A.'s office had very little to do with what I said to reporter about what our clients will face.

Q. Okay. So, your experience in private practice—

A. Yes.

Q. —were the basis of your statement in the paper?

A. Yes.

Q. Would you relate to the Court your experiences in private as to blacks serving on juries?

A. It is my experience, after approximately eighteen years of doing Defense work, that in very few cases will a black juror remain, will actually be on the **[87]** jury, will make it through the panel and come on a jury.

Q. And more often than not, would it be a fair statement to say, nine out of ten blacks are going to be struck by the State, based on your experience?

A. In the cases that I am—I have been involved in, in either picking a jury or trying the case myself, have—I can never recall a case in which either I, or a lawyer associated with me in the defense trial, struck a black juror. And in very few of the two-hundred and fifty or so jury trials I have been involved in, in probably less than fifteen or twenty, was there ever a black juror that was—that served on a jury.

Q. Now, is the reason that you didn't strike the jurors because you just assumed that the State was going to do it?

A. In deciding who we were going to strike, either I or the lawyer I had been working with, we have many times made the assumption that the State would strike the black and Hispanic jurors.

Q. Why did you make that assumption?

A. Experience.

Q. Experience?

A. Yes, seeing it occur—

MR. WEST: No further questions.

A. —over an eighteen year period.

[88] Q. (By Mr. West) One other question. You are talking about both misdemeanor and in felony court cases?

A. Well, I would say more criminal felony than misdemeanor court because of the number of strikes.

Q. Based on experience?

A. Yes.

THE COURT: Mr. Kinne, any questions by the State.

CROSS EXAMINATION

BY MR. KINNE:

Q. Mr. Tait, you indicated that while you were an Assistant District Attorney, as far as you were concerned, there was no policy in the District Attorney's office with regard to excluding any minority from the jury simply because of their race or religion?

A. My recollection of that period, '66 through '68, was: I can say that I was never told that that was required to be done or that was office policy. There were some lawyers who felt it was best to be done, and I considered that to be their prerogative, or how they felt about it.

Q. Those lawyers that you are talking about; of course, you know myself, you know Mr. Macaluso and Mr. [89] Nelson. Are any of us one of those lawyers?

A. You were not in the office by the time I left.

Q. All right. So, I take it the answer to the question is no?

A. That's correct.

Q. When you say that you assumed that the State would strike minority members of the jury; is that simply because they were a member of some minority, or because they had a tendency to empathize with the defendant, or not be strong and law enforcement minded like the State would like?

A. I cannot testify as to why another lawyer would strike someone, I merely tell you that my observation has been that those black jurors who are qualified and who make it into the last thirty-two, that very few of those serve. Now, as to why they're struck, I couldn't tell you.

Q. But even going as far back as to when you were in the D.A.'s office, I think you have told us that you picked juries and you put members of minorities, including blacks, on juries; is that correct?

A. I do not recall. And, again, my recollection of that period, '66 to '68, was that we saw very few minori jurors in the panel.

Q. Okay.

A. I do not recall specifically striking or [90] putting them on, or anything, from that period of 1966 to '68 that I was involved in.

Q. You don't know whether you struck any minorities, or you didn't, or you don't recall?

A. I don't recall.

Q. It was not policy, at any rate.

A. The—if it was policy, it was not known to me.

Q. Nobody ever told you, "If you put a black juror on there you are fired?"

A. That's correct.

MR. KINNE: That's all. Thank you.

THE COURT: Anything else?

MR. WEST: That's all.

(An off the record discussion was held out of the hearing of the court reporter.)

[91] NORMAN KINNE,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name.

A. Norman Kinne.

Q. How are you employed?

A. I am an Assistant District Attorney in Dallas County, Texas.

Q. How long have you been employed as an Assistant District Attorney for Dallas County, Texas?

A. Fourteen years four and a half months.

Q. And have you served both in misdemeanor and felony courts?

A. Yes, sir.

Q. I will ask you—I will ask you whether or not you are referred to now as the Chief Felony Prosecutor?

A. I—yes, sir.

Q. And you are the prosecutor that will put on the testimony in the case styled the State of Texas versus Thomas Joe Miller-El?

[92] A. Yes, sir.

Q. I will ask you, Mr. Kinne, how many capital murder cases have you tried?

A. Eleven or twelve.

Q. And that's over your fourteen to—over your fourteen year—

A. Yes, sir.

Q. —time that you have been in the D.A.'s office?

A. Well, that includes one before I came to the D.A.'s office, when I represented—

Q. As a defense counsel?

A. Defense Counsel, yes, sir.

Q. So, you have got one as a defense counsel?

A. Yes, sir.

Q. The one where you were the defense counsel, were there any blacks on that jury, the final jury?

A. I don't recall. I know there was one Latin or Hispanic female, I remember that.

Q. On the one you tried as a defense counsel, were there any blacks on that jury, the final jury?

A. Yes, sir.

Q. You do not recall any black male or female on that jury?

A. I just don't recall right now.

Q. How many—did you try any capital murders [93] during the year of 1985?

A. '85? No, sir.

Q. Last year?

A. No, sir.

Q. What about '84.

A. Yes, sir, I believe so.

Q. How many did you try in '84?

A. It is kind of hard for me to keep track of them by years, but I think we tried two.

Q. Were any blacks on those?

A. I don't recall.

Q. Were there any black jurors finally selected to sit in the two cases that you think you tried in 1984?

A. Mr. Cunningham, I don't keep track of how many blacks, or whites, or reds, or yellows are on a jury. I don't remember.

Q. Do you recall a black being on any of the eleven or twelve juries, capital murder juries, that you have tried?

A. Yes, sir.

Q. Yes, sir, you, do recall some, or you don't recall some?

A. Sure, I recall some, yes, sir.

Q. Tell me when was the first time you put one on a capital murder jury.

[94] A. I can't tell you, but I know there have been blacks on most of the cases I have tried.

Q. Do you know the names of the last—do you know the names of the capital murder cases that you tried?

A. I recall some of them, I don't recall all of them.

A. Those that you recall, would you give me the names?

A. David Wayne McKay, Harold Joe Lane, Tommy Mann. Some of those I assisted in, you understand.

Q. Okay, I understand that. When you say assisted, that would have meant you would have been in the jury selection process and someone else was putting on the evidence?

A. Yes, sir.

Q. Go ahead.

A. John Fearance.

Q. How do you spell Fearance?

A. F-e-a-r-a-n-c-e. I just can't recall any of the other names right now.

Q. Do you remember whose court David Wayne McKay was in?

A. I believe it was Judge Chapman, I am not positive.

Q. What about Harold Joe Lane?

[95] A. I think that was Judge Meier, I believe.

Q. Tommy Mann?

A. Judge Chapman.

Q. And John Fearance?

A. I think that was Judge Mead at the time, I believe.

Q. Those are all that you can think of right now?

A. Those are all the names I can recall right now.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Mr. Macaluso, any questions?

MR. MACALUSO: No questions.

THE COURT: Do you have anybody here now?

PAUL MACALUSO,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

[96] Q. State your name, please.

A. Paul Macaluso.

Q. And are you employed, sir?

A. Yes, sir?

Q. Where are you employed?

A. Dallas County District Attorney's office.

Q. How long have you been so employed?

A. Thirteen years.

Q. And you have been—have you worked in both misdemeanor and felony courts?

A. Yes, sir.

Q. And what position do you hold now with the Dallas County District Attorney's office?

A. I am the chief prosecutor assigned to Judge Loving's court.

Q. That's the 282nd?

A. Yes, sir.

Q. How many—I will ask you whether or not you have had an occasion to try, either as the one that put on the evidence, or as one of the two Assistant D.A.s that picked the jury, any capital murder cases?

A. Yes, I have.

Q. Can you tell the Court, approximately, the approximate number of cases, of capital murder cases, that you have participated in?

[97] A. Eight to ten, twelve, somewhere along there.

Q. Have there been any where you were the one that was putting on evidence?

A. No.

Q. In other words, all of yours, all of your eight to ten to twelve, would have been in the process of selecting the jury and making the determination of how the peremptory strikes should be used?

A. Yes, sir.

Q. Do you recall the names of any of the cases that you have participated in?

A. Yes, sir.

Q. Would you tell me what they are, sir; and if you remember, the court also?

A. Danny Lee Barber in Judge Zimmermann's court in 1980, I believe. Howie Ray Robinson in 1977 or '78, I don't recall which.

Q. Whose court was that in?

A. That was in Judge Mays' court. David Wayne McKay, I believe that was in Judge Chapman's court. Montoya was the last name, that was in Judge Loving's court.

Q. The 291st?

A. 282nd.

Q. 282nd.

[98] A. And Ronald Curtis Chambers.

Q. Ronald Curtis Chambers?

A. Yes, sir. And—

Q. Whose court?

A. Judge Maloney's court.

Q. Okay.

A. There are some others I have participated in, others I filled in and assisted in other cases.

Q. Do you recall whether or not there were any blacks that were actually selected to sit as a juror in Danny Lee Barber's case?

THE COURT: Which case, Danny—

MR. CUNNINGHAM: Danny Lee Barber.

A. I don't recall.

Q. What about Howie Ray Robinson?

A. Yes, sir, I do recall there was.

Q. Sir?

A. What was your question again?

Q. Was a black selected to sit as a juror in Howie Ray Robinson?

A. Yes, sir, there was.

Q. There was one?

A. Yes, sir.

Q. What about David McKay?

A. There may have been, but I just don't recall. [99] Oh, I left out—I remember some other cases now. I can think of some others.

Q. Is McKay—you don't know.

A. I don't recall; that's right.

Q. What about Montoya?

A. I think there was, but I am not sure.

Q. You are not sure? I will put a question mark.

A. I am pretty sure there was, though.

Q. What about Ronald Chambers?

A. No, I don't think there was.

Q. You said you remember some other cases?

A. James Edward Nolan.

Q. James who?

A. James Edward Nolan. That was in Judge Mays' court.

Q. Judge Mead?

A. Mays.

Q. Any blacks on the jury?

A. Yes, sir.

Q. Finally selected?

A. I think there were.

Q. How many?

A. A couple.

Q. Do you remember any other cases?

A. I am sure there are two or three, four other **[100]** cases that I participated in, but not from start to finish.

Q. What about Bobby Joe Daniel; did you participate in that one?

A. I don't think so, that doesn't ring a bell.

Q. Michael Wayne Evans?

A. No.

Q. Stanley Keith, to the best of your recollection?

A. No.

MR. CUNNINGHAM: Pass the witness.

THE COURT: Mr. Kinne, any questions?

MR. KINNE: No questions.

THE COURT: That's it, Mr. Macaluso. Do you want to call Mr. Nelson to the stand?

MR. CUNNINGHAM: That's all for right now; Judge.

THE COURT: Ready to go?

MR. WEST: We are ready to proceed.

HAROLD ENTZ,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

[101] DIRECT EXAMINATION

BY MR. WEST:

Q. Would you please state your name.

A. My name is Harold Entz.

Q. What is your profession?

A. I am Judge of County Criminal Court No. 4 in Dallas.

Q. How long have you been Judge of County Criminal Court No. 4?

A. Twelve and a half years.

Q. Twelve and a half years? Prior to becoming a Judge in that particular court, did you hold any other type of employment?

A. Private practice immediately prior to that. And prior to that, I was a prosecutor in the Dallas District Attorney's office.

Q. What years were you a prosecutor in the Dallas County District Attorney's office?

A. '67 through '69.

Q. Now, while in the Dallas County District Attorney's office did you have occasion to practice in both county and district court?

A. I did.

Q. Now, could you tell the Court whether or not **[102]** you had any, during the period of your practice in the District Attorney's office—and I assume that you did try cases?

A. I did.

Q. Did you ever have any blacks on your jury?

A. Yes.

Q. Okay. Did you ever know of any type of policy to exclude blacks from juries?

A. I did not.

Q. Did you have occasion to, while in the District Attorney's office, read any type of handout that was prepared by John Sparling?

A. No.

Q. Okay. Now—

A. Unless—I believe the article about which you make reference was written after I left the District Attorney's office.

Q. And you entered into private practice?

A. That article was written in '77?

Q. I think '69.

A. No, I was not aware of that. I was not aware of that article till later.

Q. While in private practice did you have occasion to try both county, and misdemeanor, and felony cases?

[103] A. I did.

Q. Do you recall any trials during that period what period of time are we talking about here?

A. I was appointed June 18, 1973.

Q. From the period of '70 to '73, do you recall any juries where the State—strike that. Do you recall any juries where you had blacks on them?

A. Mr. West, I can't recall one way or the other, to be perfectly candid with you. I just don't remember.

Q. Okay. Now, as a Judge for the past twelve years, have you had occasions where the State would seek to, change the composition of a jury panel?

A. I have.

Q. Would you—

MR. CUNNINGHAM: What did he say?

MR. WEST: "I have."

Q. (By Mr. West) Would you elaborate on that, sir?

A. Mr. West, it was within the past three or four years, the State made a request to shuffle the jury. This was about the time when numerous Dallas County cases were being reversed for the refusal of the Judge to permit a shuffle. Being well aware of those appellate opinions I granted the State's request. And while the process of the shuffle was being completed, the State volunteered the **[104]** information that they requested a shuffle because a predominant number of the first six, eight or ten jurors were blacks.

MR. WEST: No further questions.

THE COURT: Mr. Kinne, any questions of Judge Entz?

CROSS EXAMINATION

BY MR. KINNE:

Q. Judge, let me ask you: You know, of course, myself, Mr. Macaluso and Mr. Nelson; is that correct?

A. Yes, sir. Other than you, the other two gentlemen nave been assigned as prosecutors by your office to my court at one time or another, as has Mr. West.

Q. During the time that Mr. Macaluso and Mr. Nelson served in your court, I presume that they had occasion to pick juries; is that correct?

A. Many, many times.

Q. All right. During the time that Mr. Macaluso and Mr. Nelson were there, the juries that they picked; do you recall there being minorities on those juries, blacks and Latin Americans?

A. Mr. Kinne, though with specificity I cannot pinpoint certain defendants, I am not aware of their **[105]** excluding racial minorities when they were prosecutors assigned to my court on a systematic basis.

Q. All right, fine. This prosecutor who made this request for a shuffle which you apparently overheard him say was because—

A. Hearsay.

Q. Hearsay, right. Because there were too many blacks apparently in the front of jury panel; is that correct?

A. Correct.

Q. I guess it is needless to ask since you said it was hearsay; it wasn't one of the prosecutors involved in this case?

A. No, it was not.

Q. Then, as far as you are concerned during your tenure with the D.A.'s office, and since—and during your tenure as a Judge here in Dallas County, as far as you are aware, there's never been a policy with the D.A.'s office to systematically exclude people from juries merely because of their race?

A. I am not aware of one.

Q. Thank you.

THE COURT: Mr. Cunningham or Mr.—

MR. WEST: Nothing further.

THE COURT: Judge, thank you. You **[106]** can be excused.

MR. CUNNINGHAM: I want to call Judge Kindeade [sic], if I could, out of order. He's got a jury trial he is trying to get back to. I thought we should accommodate him.

ED KINKEADE,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name, please.

A. Ed Kinkeade.

Q. What is your business or profession?

A. I am a lawyer.

Q. And how long have you been practicing?

A. Since May of 1974.

Q. Do you hold any elected office as of this time?

[107] A. Yes.

Q. And what elected office do you hold?

A. I am Judge of the 194th District Court here in Dallas, Texas.

Q. How long have you been Judge of the 194th District Court of Dallas County, Texas?

A. Since September 1st, 1981.

Q. For the purposes of the record, is that a felony court or misdemeanor court?

A. A felony court of general jurisdiction, but we primarily hear felonies.

Q. Do you have any connection with the central juryroom? Are you the Presiding Judge for the central juryroom?

A. Not anymore, I was last year.

Q. When did your term expire?

A. We appointed somebody else two or three weeks ago.

Q. So, up until two or three weeks ago you were the Presiding Judge with—

A. Of the—Presiding Judge of the central juryroom, yes, sir. That's correct.

Q. Okay. To your court, I believe, you have felony prosecutors assigned; is that correct, sir?

A. Yes, sir.

[108] Q. Have you had an opportunity to read an article that was contained in the Dallas Morning News on Sunday, March 4, 1986, entitled Race Bias Pervades Jury Selection, Prosecutors Routinely Bar Blacks, Study Finds?

A. I read some of it.

Q. And I believe there was a follow-up article on Monday, March 10; did you read that one also?

A. I read that one.

Q. And I will ask you whether or not, as a result of your having read the articles contained in the Dallas Morning News pertaining to jury selection, you had cause to do anything in your particular court with respect to the selection of minorities to juries, on juries in your court?

A. To that question the answer is no.

Q. I will ask you whether or not you have proposed, or are in the process of thinking about proposing to the Judges,

that they, that the Judges, will tell the prosecutors that the exclusion of minority jurors solely for racial reason will not be tolerated? Will not be tolerated is my words, maybe there are other words that you used.

A. Should not be tolerated now.

Q. Should not be tolerated now?

A. Yes.

Q. Okay. I will ask you whether or not the **[109]** reason you are urging this to your other judicial colleagues, to take these steps to halt prosecutors from systematically barring minorities from trial juries, is a result of your having read the articles either Sunday or Monday in the Morning News dealing with race bias and jury selection?

A. Oh, probably partly but not primarily.

Q. You say partly it is because of what you read but not primarily? Are there other reasons why you propose to urge your judicial colleagues to take steps to halt prosecutors from systematically barring minorities from trial juries?

A. It is my personal feelings, what I think is fair and just in my job.

Q. Your personal feelings is why you propose urging this to your other colleagues, realizing that you cannot make them do anything, but you can ask them to do it?

A. Right.

Q. Tell us your personal feelings.

A. About what? I will be glad to.

Q. Okay. You propose to urge to your judicial colleagues to take steps to halt prosecutors from systematically barring minorities from trial juries. Do you propose doing that, sir?

[110] A. Well, I have done that already in my court, but I am going to propose that, or suggest to the other Judges that they consider doing something individually in their courts. I don't have any authority to tell any other Judge how to do anything, but I am going to talk to them about it, and then

everybody is going to make their own decision based upon what they think is right.

Q. Now, I understand that you said you have already done it in your court?

A. Right.

Q. Would you tell me what you did in your court to attempt to assure that minorities are not barred from sitting on trial juries?

A. That if you don't question a minority prospective juror you are going to have to put on the record why you are using a peremptory strike if all are used against minority veniremen.

Q. In other words, to see if I understand: If there are, say, six minorities in the first thirty-two, all thirty-two being qualified and there have been no challenges to the minorities in your court, the State is going to be required to state why the minorities are being struck?

A. If they're only striking minorities with their peremptory challenges, or some vast majority, if that's

* * * *

[114] excluding minorities, I hope does not include anyone of us three.

A. I don't think you have ever tried anything in front of me.

Q. Therefore, the answer is no; is that correct?

A. Well, that was my answer.

Q. And I take it what you are telling us is that you have had individuals in your courtroom, prosecutors, who you felt were excluding minorities based solely on the fact that they were minorities?

A. I can't read their mind, but I have seen them use their strikes solely on minorities to strike every minority.

Q. Well, let me ask you: It was your opinion, then, based upon what you observed of certain individuals, that these individuals were systematically excluding a particular group. Is that correct?

A. I don't know if they're systematically excluding a particular group, I just know they struck every minority on the panel. It might not have taken ten strikes, but they did strike every minority in the first thirty-two.

Q. Whether it was systematic or not, you don't know why they struck these minorities, but they did?

A. That's right.

[115] Q. Okay. And you are saying that you have prosecutors in there now, in your court, apparently who do not do that?

A. That's right.

Q. And you have had other prosecutors in your court who do not do that?

A. That's correct.

Q. Would that lead to the conclusion that there is no policy in the D.A.'s office of Dallas County to systematically exclude blacks?

A. Must not be because I get juries with minorities on them with some sets of prosecutors; that's correct.

MR. KINNE: That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. I'm sorry, were your last words, "with some sets of prosecutors"?

A. Right.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Thank you, Judge, you can **[116]** stand down.

JOHN STAUFFER,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name, again, please.

A. Stauffer.

Q. And I believe you have to get back to your office in order to meet a paying client?

A. Hopefully, the client will show up with the money, I hope. A lot of times, you know, they say they're coming and bringing the money, but either they don't appear or they come without the money.

Q. The reason I asked that is probably, if you are direct in answering my questions and Mr. Kinne's questions, you will be able to make it okay.

A. I will be as brief as I can.

Q. What is your business or profession?

A. I am in the private practice of law.

Q. How long have you been in the private practice **[117]** of law?

A. Almost seven years.

Q. Have you ever been employed by the Dallas County District Attorney's office?

A. Yes.

Q. When [sic] were you employed by the Dallas County District Attorney's office?

A. From September of 1964 until June of 1979, fifteen years approximately?

Q. Sir?

A. Approximately fifteen years.

Q. I will—and you were in the office at the time a manual was prepared by John Sparling dealing with the selection of jurors; is that correct, sir? Or do you remember that?

A. Well, it was a paper that he prepared for a manual.

Q. Okay.

A. The manual was a contribution type of thing. Many speakers who were teaching at the District and County Attorneys Association Annual School For Prosecutors, they would prepare a paper to go along with their oral presentation. It was a handout, but those were gradually collected and they made a manual.

Q. Was the manual updated from time to time **[118]** from—while you were in the District Attorney's office up until the time you left in '79?

A. The first three years that we had the manual it was updated every six months, because the school was every six months. Then the grants ran out, and when we go' the new grant it was just to be annually, so they only revised the manual once a year after that.

Q. This manual was for use by who?

A. Well, originally the District Attorney had established a chair in the D.A.'s office called the Director Of Training.

Q. Okay.

A. And the county didn't feel—the Commissioners didn't feel they could support that, that they had the funds to do it. So, the District Attorney applied to the Federal Government for a grant in order to have a training program, in-house program so to speak, for the prosecutor's staff. We got the grant in 1971 and it was for three years, and I was the one that—the grant only called for one hired employee, and I was the one that was the hired employee. In other words, the county really was reimbursed for my salary during that period of time from the grant. And the grant also had money in it for the printing of the handout material that went with the school.

Q. And I believe you said that that continued—**[119]** initially, it was reviewed every six months, then after the grant, the second grant, it was renewed once a year?

A. That's correct.

Q. And was the second period for three years, an additional three years?

A. Yes. There was—there was a gap of five months between the ending of the grant of three years and our getting it reestablished. We had a five month hiatus in there.

Q. This manual was for the use and benefit of the persons employed by the Dallas County District Attorney's office. Is that correct, sir?

A. Yes. But the grant, the application for the grant. When we presented it we were asked by people in Austin who administered the federal money that was given to this state, they asked us if there were any prosecutors outside of Dallas County that might want to come and attend, if we would object to that. And we thought they were talking about Waxahachie, or McKinney, Collin County, Midland—I don't mean Midland, maybe Greenville. So, we said yes, not realizing that when we started it people, would be interested from all over the state. And pretty soon we had people coming to attend the course from a hundred and sixty-five counties. Came from as far away as El Paso.

[120] Q. These was either District Attorneys or County Attorneys?

A. Or their assistants.

Q. Or their assistants?

A. Yeah.

Q. Were you the person that was in charge of this program the entire six years that it was in force and effect?

A. Yes. When we no longer had our second grant, when that three years ran out, it was then taken over by the Texas District and County Attorneys Association. They already had a grant and they added money to their grant for them to take it over. By this time, people looked forward to coming to it from all over the state. We would have representation there from maybe two-hundred twenty counties, even investigators came sometimes.

Q. Okay. While you were in the District Attorney's office did you have occasions to try any capital murder cases?

A. Yes.

Q. Can you tell us, roughly, how many you tried?

A. Oh, I can't give you a figure on it, but three or four at least.

Q. Okay. During—well, were there any black jurors on any of the three or four capital murder cases **[121]** that you tried while you were in the District Attorney's office?

A. Yes.

Q. Can you tell us—well, did you have a black on each of the three or four?

A. No. I remember one particular case very well, it was about fifteen years ago, it was either 1970 or '71, wherein we had a black defendant. I think most of the other death penalty cases that I participated in we had white defendants, it just so happened, the ones I was on. But there was a case, it was one of the Blitz Bandit cases. The media referred to it as the Blitz Bandit because they would blitz in and blitz out of a business establishment and perform an armed robbery. And in one of those blitzing in and blitzing outs they shot and killed the white woman proprietor of this little store. And she had a black employee in there who was a butcher in her little store, and they made him lie on the floor but he got to see everything. So, we were trying that case for the electric chair. This was back when the law provided for the electric chair, under the old law. And the victim was a white woman, the defendant was a young black male. On the jury in that case there was one black member, and he was elected foreman, and we did get the electric chair in that case. That was in Judge Scales' court, the 195th.

[122] Q. Can you tell us, roughly, when that was?

A. Well, it was either 1970 or 1971. I left when I—when the grant came through in '71, then they took me out of the court as a regular prosecutor assigned to one court and I became, well, the Director of Training, but occasionally I would still try a case now and then.

Q. How long did the jurors stay out on guilt or innocence?

A. They stayed out, altogether, eleven hours.

Q. Was the black juror the cause of the jury staying out as long as they were?

A. No, I learned later in talking with him well, this may be several months after the trial was over—I visited with him one day and he explained to me what the hold up was on it, why it took them eleven hours to reach a guilty.

Q. It was not him?

A. No.

Q. How long did it take them to reach a verdict on the electric chair?

A. One hour.

Q. On the other two or three—well strike that. Up until that time you would have been in the District Attorney's office how long?

A. About seven years.

[123] Q. Okay. Would that have been the first black, that you know of, that had served on a capital murder jury?

A. It was my understanding that that—when this black man was taken as a juror in the case I just mentioned about the Blitz Bandit case, that I had the distinction at that time of being the first prosecutor in the state trying death penalty case—not just here but anywhere in the state—wherein the accused citizen was a black person and the victim was a white person, wherein a black person ended up on the jury. I sort of wear that proudly.

MR. CUNNINGHAM: Pass the juror. Pass the witness.

THE COURT: Cross? Oh, I am sorry.

Q. (By Mr. Cunningham) Mr. Stauffer, I show you what's been admitted as Defendant's Exhibit No. 1, and ask you whether or not you have had occasion to see that document before?

A. Yes, I think I have.

Q. Would that have been the document written by John Sparling pertaining to the selection of jurors?

A. Yes, it is.

Q. And was that document included in the manual that—well, in '71 you became Director of Training; was that document included in all of the—

[124] A. As I recall.

Q. —training manuals?

A. As I recall, Mr. Cunningham, I got him to write this. In other words, when we were trying to prepare the manual to square up to the obligations we had made on the grant. In other words, when we applied for the grant one of the things we said we would do would be to prepare a training manual. And I asked all of the people who were assigned to speak on different subjects at the school to prepare a paper that went with their talk. And so, that is how this came to be written in the first place.

Q. Would it have expressed the policy of the office with respect to how jurors were selected?

A. Well, I don't necessarily think it would express the policy of the office, the office didn't really have any set policy. It was Mr. Sparling's, John Sparling's, idea of—in picking a jury, just generalities.

Q. Well, he wrote it and it became of such—it must have been of such good quality because you included it in your manual, didn't you?

A. I included all—everybody that was good enough to take the time to speak at our school, because there was no money for them. Those who took the time to prepare a presentation and to prepare a paper to go with **[125]** it, I was very grateful to them.

Q. And you put it in the manual?

A. We did.

Q. And you reviewed the manual, and if there were, changes you took out what was not of any force then?

A. At one time I remember he talked to me about it. He said, "I am not sure that I want my paper to be published anymore," after it had been in there maybe through two or

three editions, back when we were doing it every six months. He said he would like to take it out because he thought maybe some people didn't understand, maybe they would be offended. And I encouraged him, I said, "John, there's not anything to be ashamed of in that paper, all you are doing is saying, 'if you are trying a Mohammedan or Muslim don't put people on the jury wearing turbans,' any lawyer would understand in reading that what you are saying." "Well, he said, "I know, but some people might misunderstand." And I was the one that encouraged him to do it. About that time, Time Magazine came out with a big article about him, rather derogatory, and I remember I kidded him. I said, "See, you did what I told you and now you are world famous," and he didn't think that was very funny.

MR. CUNNINGHAM: Pass the witness.

THE COURT: Do you care to talk to **[126]** him, Mr. Kinne?

CROSS EXAMINATION

BY MR. KINNE:

Q. Mr. Stauffer, you have already explained to us, I believe, that these papers that were presented at the District Attorneys' School did not represent policy of the office; is that correct? This paper or any of the rest of them?

A. Well, No. In other words, there's never been any effort ever made to take this manual that we had gotten together, that we had edited and put together to go with our school, there had never been any endorsement by the District Attorney. I don't think Mr. Wade ever looked at it to any extent, he certainly didn't review it before it went to press. It was done by Thomas Reprographics, whatever it is, sort of a high class xerox deal, that's how it was printed. It just had a paper cover on it until, oh, I think it was in the fourth year that we were able to have binders, regular three-ring binders.

Q. Whether or not this was the—are you saying this was the first, in 1970 or '71, the first black person to serve on a death penalty jury, or the first black person to serve on a

death penalty jury where the victim was a **[127]** white person?

A. And the- defendant was a black person.

Q. The victim was a white person and the defendant was a black person, all those things combined?

A. In other words, I don't think there had been any death penalty case tried in the State of Texas prior to this Blitz Bandit case—I'm sorry I don't remember the name of the defendant—wherein the victim was a white person and the accused citizen was a black person, trying it for the death penalty, where a black was on the jury. That's my understanding.

Q. You are not saying that case in 1970 or '71 was the first time that a black person served on a death penalty jury in the State of Texas or Dallas County?

A. No, I'm not saying that.

Q. All those things combined, okay. I take it then since you have—did you select the jury in that case?

A. Yes I did. I had two people helping me; Winfield Scott was second chair, third chair was Don Driscoll.

Q. I take it then, since you selected a black man to sit on that particular jury and you were an Assistant district Attorney working for Henry Wade, that it was not the policy of the District attorney's office to exclude **[128]** black people from death penalty juries simply because of their race?

A. That's right.

Q. As a matter of fact—

A. Nobody ever said anything to me about it upstairs, and I didn't—you know, when the jury was selected and all. I think the black man was the second juror that we selected and we still had ten to go, but I never, ever during the balance of jury selection, or throughout the trial, or any time ever, had anybody say anything to me from Mr. Wade on down through the hierarchy about my doing that.

Q. Then, is it your understanding that as long as you were with the District Attorney's office it was never the policy of the District Attorney's office to systematically exclude anybody, black, Mexican, Oriental from a jury simply because of their race?

A. That's right. We did take into consideration any possible sympathy that a potential juror might have for the accused citizen. In other words, if we were trying a black person we, particularly if the victim was a white person—I am not talking about a death penalty trial but any trial—we worried that perhaps the black jurors might find the accused citizen guilty but might be lenient on penalty. This would worry us sometimes, just as if you **[129]** were trying a woman you might not put other women on the jury, or something like that.

Q. As a matter of fact, a careful reading of the article written by Mr. Sparling on the front page says, and I quote, "The outline does—referring to this paper—however, contain one prosecutor's ideas on some things that need to be said to the panel and some things to look for in a juror" Is that correct?

A. That's correct. In other words, we encourage these people, or asked these people to take part in this school. We had about thirty-five different subjects that we wanted covered; everything from examining hearings, examining trials to putting on a different type of case, putting on a robbery case, putting on a burglary case, theft case, and so on. We invited people not just from the Dallas County District Attorney's office, but we had a number of people from Harris County who participated, who came up here and took certain topics and prepared their paper to go with it at my request. I know we got ready to go to press a few times and there would always be somebody who didn't have his paper in. We would have to burn a fire under him to get it done, but none of those people were in any way forced or put in a box as to what they could teach, say or write. We were glad and grateful for their time because we couldn't pay them any-

thing for it. We didn't [130] have a way to reimburse people from Harris County for their travel up here.

MR. KINNE: Thank you, John. That's all we have.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr. Stauffer, initially when John Sparling wrote that handout, or article, or whatever you want to call that, it may have been one prosecutor's opinion with respect to jury selection; is that correct?

A. That's correct.

Q. However—well, let me ask: Did any other person furnish any information with respect to jury selection in '70 or '71?

A. No, not that I know of, he was the one. You know, when we were making these assignments and trying to get somebody to take this subject or take that subject, we were able to entice him into sticking his neck out to do this and prepare the paper that went with it.

Q. After you had gotten your grant and were able to combine all of the material into a manual, that [131] Defendant's Exhibit No. 1 is the material that went in there to tell prosecutors in Dallas County a method of selecting jurors? Is that correct, sir?

A. Well, it was a paper that—to try to give them some ideas, things to think about in jury selection, you know. Jury selection is still very much an inexact science, everybody has their own ideas about it.

Q. You thought enough of it as the director to include it in the manual, so that future prosecutors would be able to look at that manual when they wanted to get some ideas about how to select a jury that was prosecution prone, they would have that material?

A. How to use their strikes, really. Really, you don't, select who-you want, you just select who we don't want.

Q. That particular article continued in the manual up until '79 when your money ran out? Or '76 is when your money ran out; is that correct?

A. Right, but then the State took over. Whether his paper was still in after the State took it over or not, I don't remember. It seems to me it was. May I just say one thing on that? The reason that Sparling's paper remained in there throughout and was never changed from him to somebody else is because he stayed with the District Attorney's office through those years. We have an awful [132] lot of turnover in the Dallas County District Attorney's office, as you know, Mr. Cunningham. A lot of times I would have somebody lined up to talk with us, say, on how to try an armed robbery case and he would prepare his paper; and the next time we were to give the school and reprint our manual again that person would no longer be in the D.A.'s office. I would have to try to entice somebody else to take that responsibility over and revise the paper, if it needed revision.

Q. But the paper that's in your hand there was never revised from '70 or '71 through '76 when your money ran out?

A. Well, it may have been revised, but if it was, it was revised by John Sparling.

Q. Then continued in the manual?

A. Yes. Each author had the opportunity to add to, or to subtract from, or change their paper if they wanted to. Now, an awful lot of people were lethargic about doing it and their paper would get out of date with new law.

Q. And I believe you said it is your impression that that particular article dealing with the selection of jurors carried over in 1977 when your money ran out and it was taken over by the state?

A. Right. And when they started doing the [133] manuals they were beautiful, because they had great big binders and all kind of money. And it came out, I think, in a four-binder set, and it made me a little jealous because mine never were that pretentious.

MR. CUNNINGHAM: You are on your own time now.

THE COURT: May he be excused?

MR. CUNNINGHAM: Yes, sir.

MR. KINNE: Yes, sir.

MR. CUNNINGHAM: Your Honor, at this time we would renew our request for Steve McGonigle and Ed Timms.

THE COURT: I am going to sustain the motion of the Dallas Morning News to quash those subpoenaes. I will give you the opportunity, if you want, to make an offer of proof in that regard though, as soon as—

MR. WEST: Your Honor—

THE COURT: I am not trying to cut off argument. I think you, Mr. McElhaney and Mr. West, made arguments earlier today. If you have anything else you want to say, I didn't intend to be abrupt with you on it. Assuming you do not, if you want to **[134]** make an offer of proof, I will certainly, for the purposes of making the record, let you.

(Thereupon, Defendant's Exhibits No. 4, 5 and 6 were marked for the purposes of identification.)

MR. CUNNINGHAM: Your Honor, for the purposes of this offer of proof: If Steve M-c-g-o-n-i-g-1-e and Ed Timms were called they would testify that they are staff writers for the Dallas Morning News, a newspapers published in Dallas, Dallas County, Texas. That on or about Sunday, March 9, 1986 they wrote an article jointly, the first in a series, entitled, Race Bias Pervades Jury Selection Prosecutors Routinely Bar Blacks Study Finds. That is an article that appears on page 28, and 29, and page 30. We would offer all of the materials contained in that article pertaining to the race bias which pervades in jury selection, marked Defendant's Exhibit No. 4. We offer as—we would also offer, first offer, the March 9, 1936, it is **[135]** marked Defendant's Exhibit No. 4. The second offer is Defendant's Exhibit No. 5, and it would be an article entitled, Jury Selection Bias Throughout Texas, a second in a series by Ed

Timms and Steve McGonigle, M-c-g-o-n-i-g-1-e, beginning on page 1 and continuing over to page 10A.

The third article written by the same two staff writers, and the last in a series, was written on Tuesday, March 11, 1986, entitled, Some States Act To Reduce Jury Selection Bias, Prosecutors Arbitrary Exclusion Of Minorities Challenged, beginning on page 1 and continuing over to page 7A. And, also, we would offer on page 6A the, Judges Plan To Judge Action To End Jury Selection Bias, written by the two same staff writers, and referring to what Judge Ed Kinkeade proposes to offer to his fellow colleagues on the Bench.

Also, If the two staff writers were called we would have requested that they furnish us with the names of one hundred jury trials that eligible, black potential voters were called in on in the amount of four **[136]** hundred sixty-seven. That the number of blacks struck by prosecutors using peremptory challenges was four hundred five, and that of this number seventeen were double strikes. That the number of blacks struck by defense attorneys was sixteen, and that the total number of blacks selected for juries out of four thousand four-hundred thirty-four prospective jurors summoned was forty-six.

We would also offer as a part of this offer of proof—and I will have to get that—the cases of the State of Texas versus David Wayne McKay, a capital murder case out of Criminal District Court No. 1; the State of Texas versus Harold Joe Lane, a capital murder out of the 291st; the State of Texas versus Tommy Mann, a capital murder case out of Criminal District Court No. 1; the State of murder Texas versus John Fearance, a capital 20 case out of Criminal District Court No. 4; Jonathon Reed, a capital murder out of Criminal District Court No. 5; Danny Lee Barber, a capital murder case out of Criminal District Court No. 1; Howie Ray Robinson, out of the 204th District Court; the State of **[137]** Texas versus Montoya, 282nd Judicial District Court; the State of Texas versus Ronald C. Chambers, out of Criminal District Court No. 4; and the State of Texas versus

James Edwin Nolan. I will have the jurors who were selected, and material pertaining to those jurors as to their race, to determine whether or not there were any blacks that were seated, that were members of—jurors that actually sat in those eleven cases.

THE COURT: In other words, you propose to supplement your offer later on with that information?

MR. CUNNINGHAM: Yes, sir.

THE COURT: I don't mind, providing the State has a chance to meet it if they want to. Okay, is that the extent of your offer of proof?

MR. CUNNINGHAM: And, Your Honor, our investigator can—we'll attempt to find out the one hundred felony cases that were used in the articles to determine—to arrive at the graph that is shown on the front page of Defendant's Exhibit No. 4, those one hundred felony trials. I would ask the Court to hold **[138]** it open because we may want to supplement it with additional information concerning other capital murder trials that have been tried in Dallas County, specifically, with the persons who were actually jurors in those cases and the race of the jurors in those cases.

THE COURT: I haven't got any problem with that unless the State does.

MR. CUNNINGHAM: I'm sorry?

THE COURT: You propose to supplement your offer with specific information about the race of these jurors in these cases if your investigation leads you to that. Is that what you are saying?

MR. CUNNINGHAM: Yes, sir.

THE COURT: I don't have any problem with that, Mr. Cunningham. Mr. Kinne, again, I will give the State a chance, if they don't agree with your offer, we'll have a hearing on that I suppose. Anything else in your offer of proof?

MR. CUNNINGHAM: That's all at this time, Your Honor.

THE COURT: Mr. Kinne, any objection from the State other than those already made, **[139]** and that is to relevancy and such as that?

MR. KINNE: Other than those? No, sir. For the purposes of this hearing, certainly, we are not about to agree that the newspapers article is probative evidence of anything.

THE COURT: Okay. Well, I accept that.

MR. CUNNINGHAM: Your Honor, that's even more reason why we ask the two staff writers be brought in, so we could have an opportunity to examine them and determine the probative nature and the validity of their article.

THE COURT: If they were allowed to testify, wouldn't the testimony be hearsay and their opinion as opposed to factual?

MR. CUNNINGHAM: Not based upon the records, Dallas County records.

THE COURT: Which records are the best evidence of what you are trying to prove?

MR. CUNNINGHAM: They're the ones that know one hundred felony cases. If I had the list I would be able to do the rest.

THE COURT: Okay. Mr. Kinne, I noted your comment.

And the Court will, of course, **[140]** permit that offer of proof to be made part of the record, assuming I don't grant the defendant's motion. Argument on the motions? We actually have two motions, I suppose; one to quash the jury, a second, alternatively, to select a separate one to hear punishment.

Argument? More argument I should say?

MR. CUNNINGHAM: I waive opening.

ARGUMENT ON THE MOTION

MR. KINNE: Your Honor, I believe that probably the record during jury selection amply supports this. However, for the purposes of this hearing, I would like the record to reflect that the jury in this case that was selected consists of

seven white females and five males, and of that group there is one black male, there is one male of Hispanic descent, and there is one male of Filipino, hence Oriental descent. I would also like the record to reflect that during the course of voir dire examination that both the State and the Defense entered into certain agreements to excuse particular jurors. That **[141]** these agreements were for the most part, if not all, entered into in writing between counsel for the Defense and counsel for the State, wherein both sides agreed to exclude or to excuse from jury service in this case six black individuals, two individuals of Hispanic origin and one oriental. We feel that the Defense has fallen far short of showing there is any systematic exclusion of any person, or persons, from this jury due to "the" their membership in any minority. We would urge the Court to deny the motion.

THE COURT: Thank you, Mr. Kinne.

MR. CUNNINGHAM: Your Honor, before we do it, I have another offer I totally forgot. Your Honor, I am offering as Defendant's Exhibit No. 7 the questionnaire prepared by juror No. 7, Roderick R. Bozeman, a black male struck by the State as their number one strike; the questionnaire for juror No. 9, Billy Jean Fields, a black male struck by the State as their number two strike; the questionnaire for Joe Alfred Warren, juror No. 28, a black male; Edwin L. Rand, juror No. 37, a black male struck by the State; the **[142]** questionnaire for juror No. 40, Carol S. Boggess, struck by the State; Wayman Kennedy—Wayman A. Kennedy, juror No. 43, struck by the State; juror No. 71, Linda C. Baker, struck by the State, a black female; Janice Mackey, a black female, juror No. 100, struck by the State; juror No. 102, Paul Bailey, a black male struck by the State; and Anna L. Keaton, juror No. 105, a black female struck by the State. We offer in evidence those seven questionnaires of ten of the State's fourteen strikes in this case.

THE COURT: Juror Keaton was not a black person.

MR. CUNNINGHAM: Uh-huh.

THE COURT: Okay.

MR. CUNNINGHAM: Yes, sir.

THE COURT: That's fine, I just had it noted different on my sheet. Okay, those will be made a part of the record.

MR. CUNNINGHAM: Your Honor, also for the purpose of it record, Mr. Kinne indicated that we had excused six or seven others by agreement. Juror No. 17 was Hilbert Gitchoway, a black male juror; No. 30, Dora **[143]** May Randle, a black female; Jerry—juror No. 61, Jerry W. Mosley, was a black male. And that those were the only three blacks that were agreed to be excused by the parties.

MR. NELSON: Judge, we are going to the State will object to that as being incorrect. I think the record, and the Court's records, reflect that Vergie Miller, juror No. 50, was excused by agreement. No. 51, Evangelina Sustaita—I am not sure how you pronounce that—was excused by agreement. No. 56 was excused by agreement. I believe Mr. Cunningham named Mosley. Lourice Collier was excused by agreement, juror No. 67; Johnny Terry, juror No. 80; and Helen Reyes, juror No. 84, were also excused by agreement of both parties.

THE COURT: Well, of course, the record in voir dire, which is the official record, will reflect what was done. The court has the written agreements in the file on many of the jurors who were excused by agreement. And I assume, and the record again will have to be the final arbiter on this, will reflect there were a few jurors who were excused after being **[144]** voir dired for a while for one reason or another. I don't know if we secured written agreements. Because there were situations where the juror had physical problems, or something of that sort, and were excused as a result of the parties agreeing ahead of time. So, I will let the record reflect who was excused for what purpose.

MR. KINNE: Your Honor, we further object to the, I guess it is Defendant's Exhibit No. 7, all of the questionnaires, in that these questionnaires appear to contain handwriting which is not the handwriting of the juror but apparently some handwriting put on there by the Defense. We have no objection to the questionnaire as filled out by the

juror, but we'll object to whoever wrote the rest of this material that's written on these questionnaires.

MR. NELSON: Am I not correct; the Court put the original questionnaires in the Court's record as to each of these jurors?

THE COURT: I understand from the court reporter that she was accumulating them out of her set of copies.

[145] MR. NELSON: we would simply ask, since those have not been written on or have any type of marks, other than by the jurors, those be included in the record rather than Mr. Cunningham's copies.

MR. CUNNINGHAM: I have no problems with that as long as the court reporter knows which ones, and the numbers, and that they in turn will be marked Defendant's Exhibit 7.

THE COURT: I think even the Court marked his own copies for one reason or another, for personal observation. That might not be appropriate. Anything else, Mr. Cunningham?

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Do you have any argument then in response to the State's argument?

MR. CUNNINGHAM: I think the record is clear that systematic exclusion of blacks is evident.

THE COURT: I appreciate the brevity of that argument.

MR. CUNNINGHAM: John took up all my **[146]** time.

THE COURT: Mr. Cunningham, Mr. West, the State, the Court is going to deny both of these motions, not necessarily make specific findings of fact. The evidence I heard today makes me conclude, based on the testimony of these various witnesses, that the exercise of peremptory challenges in the District Attorney's office in Dallas County over a period of time has been for a variety of reasons; personal, subjective, and sometimes even emotional reasons. And that I had no evidence presented to me that indicated any sys-

tematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases. And I believe from the evidence I have heard, coupled with the current status of the law as I understand it, the Supreme Court cases including the Swaim, S-w-a-i-m, case and case out of Missouri that slips my mind momentarily—Grigsby versus Marberry, plus the other cases, convince me that I am following the law in **[147]** this regard. So, I have denied both motions.

MR. CUNNINGHAM: Your Honor, would we have the right, in case the Supreme Court decides, well, renders an opinion in Grigsby versus Marberry before we complete this trial, to possibly supplement it with what the Supreme Court says in that case; since it has already been argued and they are presently getting ready to decide?

THE COURT: Has it been argued?

MR. CUNNINGHAM: They have argued it.

THE COURT: I will say this: Any time the Supreme Court decides to change the law I am going to at least read it.

MR. CUNNINGHAM: I will tell them to ship me a copy if it is within the next ten days. Note our exception to the Court's ruling with respect to the motion with respect to the systematic denial of minorities on juries, and also the—did I understand the Court-to deny us a separate jury on punishment?

THE COURT: Right.

MR. CUNNINGHAM: Under Grigsby versus Marberry.

[148] THE COURT: At this point, unless the Supreme Court of The United States decides different, our statutes don't provide for it.

MR. CUNNINGHAM: If the Supreme Court affirms Grigsby versus Marberry what would the Court propose doing then?

THE COURT: I suppose give the defendant a new trial, if he's been convicted, because—

MR. CUNNINGHAM: Note our exception to both rulings, Your Honor.

THE COURT: Perhaps the State would answer that. Are we ready to go forward on the other motions?

MR. CUNNINGHAM: I will be in just a moment.

THE COURT: Mr. Cunningham, you had a couple of other motions to have me at least think about. Do you want to urge—

MR. CUNNINGHAM: Your Honor, we have a Motion To Sequester The Jury. We would ask that the jury be sequestered from the date that the Court brings them in to first start hearing testimony.

THE COURT: I am going to deny that at

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COURT OF CRIMINAL APPEALS OF TEXAS,
EN BANC.

No. 69677

THOMAS JOE MILLER-EL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

March 3, 1988
Rehearing Denied April 27, 1988
[748 S.W.2d 459]

OPINION

W.C. DAVIS, Judge.

Thomas Joe Miller-El, hereinafter referred to as appellant, was convicted by a jury of intentionally causing the death of Douglas Walker while in the course of committing the underlying offense of robbery, which elevated the offense of murder to capital murder. *See V.T.C.A., Penal Code, § 19.03(a)(2).* After the jury answered the two special issues in the affirmative, the trial judge assessed appellant's punishment at death. *V.A.C.C.P., Art. 37.071.*

In his brief appellant asserts thirty-six points of error. In his first seven points of error, appellant contends that the prosecutor's use of ten of fourteen peremptory challenges to exclude black veniremen from sitting as jurors in this case violated his right under the Sixth Amendment to a jury drawn from a cross-section of the community. We shall abate the appeal and remand to the trial court for a hearing under the auspices of *Batson . Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The record reflects that during voir dire, the prosecutors exercised fourteen of the allowed fifteen peremptory challenges. Ten of the fourteen challenges were used to exclude black veniremen from sitting as jurors. Only eleven members of the black race were on the venire panel. In the end, one black juror was seated. Appellant is a member of the same race as the ten excluded veniremen. Appellant contends that the conduct of the prosecutors, in excluding the ten black veniremen, violated his constitutional rights guaranteed by the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment to a jury drawn from a cross section of the community. Appellant asserts that the prosecutor's use of the peremptory challenges to exclude the ten black veniremen clearly established a purposeful or deliberate denial to blacks to participate as jurors in his case.

[460] Prior to the individual voir dire of the veniremen, appellant filed a Motion To Quash The Indictment because of the exclusion of blacks from the jury panel. After the hearing, the trial court refused to quash the indictment. In this cause, it can be argued that appellant had a *Batson*, *supra*, hearing on his motion to quash the jury that heard his case. However, given the fact that *Batson*, *supra*, was not decided until after the case at bar had been tried to completion in the trial court, and given the testimony that transpired at the hearing, we believe such an argument would border on being specious.

We find that on the facts of this case, appellant sufficiently raised the issue of the State's use of its peremptory strikes at trial to invoke *Batson*, *supra*, protections on appeal. Cf. *DeBlanc v. State*, 732 S.W.2d 640 (Tex. Cr. App.1987).

In *Batson*, *supra*, the Supreme Court reiterated its observation that the State's purposeful or deliberate denial of jury participation to black persons because of race violated a defendant's rights under the Equal Protection Clause of the United States Constitution. It then found that the State

could not challenge potential jurors solely on account of their race.

In order to invoke the protections set forth in *Batson*, *supra*, a defendant must establish purposeful discrimination by showing that:

1. he was a member of a cognizable racial group;
2. the prosecutor had exercised peremptory challenges to remove from the venire members of the defendant's race (peremptory challenges constitute a jury selection practice which permits those to discriminate who are of a mind to discriminate); and
3. the facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race.

106 S.Ct. at 1723

If the defendant raises an inference of purposeful discrimination through the State's use of its peremptory strikes, the burden shifts to the prosecutor who must come forward with a neutral explanation for the challenges. The trial court must then determine whether despite the State's explanation, the defendant has established purposeful discrimination. The Supreme Court in *Batson*, *supra*, stressed that not just any explanation would do, and in fact some explanations would per se not be sufficient. *Batson*, *supra*, 106 S.Ct.1722,1723. By largely judging credibility of the prosecutor, as well as content of the explanation, the trial judge must make a finding of fact concerning purposeful discrimination which should be given great deference by a reviewing court. *Batson*, *supra*, n. 21.

In the instant case, appellant clearly objected to the prosecutor's use of peremptory strikes. After the hearing to quash the indictment, the trial court overruled the appellant's motion on the jury selection issues by noting that the appellant failed to demonstrate systematic exclusion of black veniremen by the Dallas County District Attorney's Office.

We find that appellant has established an inference as required by the *Batson* court. First, he is a member of the black race. Second, the prosecutor exercised ten of fourteen peremptory challenges to exclude members of appellant's race. Finally, in using such a skewed number of strikes on the black veniremen, ten of the eleven prospective black jurors were peremptorily struck, with only a single black juror seated on the panel. However, it is not for this Court to say whether there was racial motivation in the prosecutor's actions. *Batson*, *supra*, requires that such a determination be made by the trial judge.

Because the trial court did not have the benefit of the Supreme Court's opinion in *Batson*, we feel it is now appropriate to remand the case so that the trial court may have the opportunity to consider first whether appellant had made a *prima facie* showing of discrimination, and then if so, whether the State had a neutral explanation for the strikes. If the State is unable to explain properly its use of peremptory strikes on minority members **[461]** of the prospective jury panel such that the trial court concludes that purposeful discrimination was the sole motivating factor behind any of the State's strikes, then the trial court should enter this finding in his findings of fact and conclusions of law. Such findings of fact and conclusions of law shall be forwarded to this Court for review.

DeBlanc, *supra* at 642.

This appeal is hereby abated with instructions to the trial court to conduct further proceedings not inconsistent with this opinion and *Batson*. The trial court shall forward the record of those proceedings and findings of fact and conclusions of law to this Court. *DeBlanc*, *supra* at 642. *Henry v. State*, 729 S.W.2d 732 (Tex. Cr. App.1987); *Keeton . State*, 724 S.W.2d 58 (Tex. Cr. App. 1986).

It is so ordered.

ORDER ON REHEARING

MILLER, Judge.

The State's Motion for Leave to File a Motion For Rehearing is denied.

This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in *Keeton . State*, 749 S.W.2d 861 (Tex. Cr. App. 1988) (opinion following abatement).

IT IS SO ORDERED.

IN CRIMINAL DISTRICT COURT VERSUS NO. 5
DALLAS COUNTY, TEXAS
APRIL TERM, A.D., 1988

[Filed June 29, 1989]

NO. F85—7 866 8—NL

THE STATE OF TEXAS
VERSUS
THOMAS JOE MILLER—EL

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HEARING
VOLUME I OF I VOLUME

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APPEARANCES

HON. JOHN VANCE
Criminal District Attorney
Dallas County, Texas
BY: HON. JEFF KECK and
MS. SHARON BATJER
Assistant District Attorneys

APPEARING FOR THE STATE

HON, ROYCE WEST
and
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Attorneys at Law
Dallas, Texas

APPEARING FOR THE DEFENDANT

BE IT REMEMBERED, to-wit: That on the 10th day of May, A.D., 1988, the above styled and numbered cause came on to be heard before The Honorable Pat McDowell, Judge of Criminal District Court No. 5 of Dallas County, Texas, and the following is a true, correct and complete transcript of all the proceedings had:

[3] PROCEEDINGS

THE COURT: Let me call, for the record, F85-78668-NL, The State of Texas versus Thomas Joe Miller-El. Let the record reflect these events: This case is a case in which the jury, having answered affirmatively to special issues after the Defendant was found guilty of the offense of capital murder—his case has been appealed to the Court of Criminal Appeals, State of Texas. I understand that briefs have been submitted and oral argument has been made. The Court of Criminal Appeals ordered this trial court to conduct a hearing which I will characterize as a Batson hearing. That is the purpose and thrust of this hearing this morning.

Are both sides ready on that?

MR. KECK: The State is ready, Your Honor.

MR. CUNNINGHAM: The defense is ready, Your Honor. Your Honor, at this time we would invoke the rule and ask that the witnesses who expect to testify be excluded.

THE COURT: Who will the State's witnesses be, Mr. Keck?

MR. KECK : We have secured the presence of both Mr. Macaluso and Mr. Nelson, Your Honor. I believe we will call Mr.. Macaluso to testify briefly and we may then call Mr. Nelson.

[4] THE COURT: In an abundance of caution, I will honor that. I'm not sure it applies in this case. These are both officers of the court, but neither one of them now is a Dallas County prosecutor so technically they're not any better than any other witness. They're just witnesses.

Mr. Cunningham, you're standing preparatory to doing something. I'm going to interpret this as a fullblown Batson hearing. By that I mean, I think I am going to insist that the defense make a showing, at least a prima facie showing, that discrimination was invoked in the State's striking of certain jurors just so, if nothing else, we will have an entire whole record. We thought, frankly, for the record, that we were doing it properly during the voir dire of the capital murder

case. I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination, but in view of the later cases and the Court of Criminal Appeal's particular order, I'm going to place the burden back on you-all to at least make a prima facie showing that Batson has been violated.

MR. CUNNINCHPM: Your Honor, on behalf of the defense at this time we would ask the Court to take judicial notice that Thomas Joe Miller-El is a member of the negro black Afro-American race.

THE COURT: I don't think there is any dispute **[5]** about that, is there, Mr. Keck?

MR. KECK: No, Your Honor. We will stipulate to that.

THE COURT: The Court will do that.

MR. CUNNINGHAM: Secondly, in support of our prima facie case, we would advise the Court or would show to the Court that Roderick R. Bozeman, prospective juror number seven, was a black male and was struck on February 5th of 1986, and was the first strike of the State.

Secondly, that Billy Jean Fields, a black male, was the State's preemptory strike number one and Bozeman was preemptory strike number—Bozeman was preemptory strike number one and Billy Jean Fields was preemptory strike number two by the State. He was juror number nine. Joe A. Warren, a black male, was struck by the State preemptorily and he was strike number six. He was number twenty-eight on the prospective juror list; that Edwin L. Rand was a black male, that he was struck by the State, that he was the State's preemptory strike number seven and he is thirty-seven on the prospective jury panel list; that Carol S. Bogges, a black female, was struck by the State of Texas and that was the State's preemptory strike number eight and she is number forty on the jury list; that Wayne A. Kennedy, a black male, was struck by the State. He was the State's preemptory strike number nine and he is number **[6]** forty-three on the jury list.

Linda C. Baker, a black female, was struck by the State and she was the State's preemptory strike number ten and she was number seventy-one on the jury list. Mrs. Janice Mackey, a black female, was struck by the State and she was preemptory strike number twelve and she is juror number one hundred on the jury list.

Mr. Paul Bailey, a black male, was struck by the State and he was preemptory strike number thirteen. He is number one hundred and two on the jury list.

Finally, Mrs. Anna L. Keaton, a black female, was struck by the State and she was preemptory strike number fourteen. She is number one hundred and five on the list.

The State of Texas, between February 5th of 1986 and March 6th of 1986, exercised fourteen of its preemptory strikes; that ten of those fourteen preemptory strikes used by the State were used to strike either a black male or a black female.

Further, in support of Defendant's prima facie case, we at this time would offer all the evidence beginning on March 12th, 1986 that was offered with respect to its motion to quash and/or suppress the jury panel and/or to strike the jury panel including the testimony of the witnesses John Sparling; Jack Hampton, judge of the **[7]** 283rd Judicial District Court; Honorable Larry Baraka, judge of Criminal District Court Number Two; Honorable Ralph Tate who, at that time was chief public defender; Mr. Norman Kinne,. first assistant district attorney of Dallas County, Texas; Mr. Paul Macaluso; the Honorable Harold K. Entz who, at that time, was County Criminal Court Number Four and is presently judge of the 194th judicial Court; the Honorable Ed. Kincaide who, at that time, was judge of the 194th Judicial District Court and is presently on the Court of Appeals district sitting in Dallas Texas; John Stauffer.

We would also, in support of our prima facie case, offer Defendant's Exhibits Numbers Four, Five, Six, and Seven which were offered during the motion to quash the jury panel because of the systematic exclusion of black minorities and the motion to suppress which the Court overruled and

denied and exception was taken thereto, We ask that all the testimony and exhibits that were offered during that hearing be introduced for the purposes of establishing our prima facie case.

We would therefore suggest to the Court that Defendant Thomas Joe Miller-El — may I have a minute, Your Honor?

THE COURT: Surely.

MR. CUNNINGHAM: Your Honor, could we have a [8] ruling on the offer of testimony and the offer of proof, Defendant's Exhibits Four, Five, Six and Seven?

THE COURT: Mr. Keck, what is the State's position?

MR. KECK : Well, judge—

MR. CUNNINGHAM: And the testimony.

THE COURT: Is that on the motion to quash that we heard pretrial?

MR. CUNNINGHAM: Yes, sir. This hearing was conducted after we had completed the jury selection process.

MR. KECK: Judge, we would object to the Court considering any of that evidence. Unless we are mistaken, and we're confident that Mr. Cunningham and Mr. West will correct us if we're wrong, all of that evidence, the testimony of those listed individuals beginning with Justice Farling and also those exhibits, that all went to establishing past racially-based exclusion of minorities in Dallas County. We don't, incidentally, feel that it established that historical fact. The Court recalls that testimony, I guess, but the point is, Batson itself is directed at the prosecutor's conduct in the instant case.

It would be our position, even if every one of these people had testified no black had ever served in Dallas County in the past, that testimony, however [9] historically and accurate it might be, would be irrelevant to the Court's inquiry of the instant case. The reason that we can inquire when it is appropriate to inquire into the prosecutor's reasoning in the instant case was, as I'm sure the Court recalls, in Batson

the Supreme Court said that this historical approach was too difficult for defendants to meet, that it was impossible for them to amass the statistical kind of evidence needed to come up to a Swain versus Alabama type of showing and that's why that evidentiary method was jettisoned by the Supreme Court of the United States.

It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing. At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this [10] hearing.

MR. CUNNINGHAM: Your Honor, in response to that, Defendant's Exhibit Number Seven was a list of the ten black jurors that were actually struck in this case. That's what one of our exhibits was, Defendant's Exhibit Number Seven. Defendant's Exhibit Number Four was the Dallas Morning News for March 9, 1986, which had information in there about the selection process. Defendant's Exhibit Number Five was the Dallas Morning News for March 10, 1986 and Defendant's Exhibit Number Six was the Dallas Morning News article on March 11th, 1986.

We would further say that Batson clearly says that the defendant may rely upon any other relevant circumstances which raises an inference that the prosecutor used the selection practice to exclude the venireman from the jury on account of their race. That is what we suggest. That motion, our motion to quash the jury, which was held after the jury selection process in this case, because of the systematic exclusion of black minorities, we can rely upon those relevant

circumstances. We can further rely upon the facts as to which there can be no dispute that preemptory challenges constitute a jury selection process that permits those to discriminate who are of a mind to discriminate.

THE COURT: Mr. Keck, again, I'm going to **[11]** overrule the State's objection to that evidence being before the Court, this Court, on this hearing. What weight, if any, I will give it, I certainly reserve for myself. Just so that the record is whole and the Court of Criminal Appeals wishes—it has got it already in front of it, I assume. That material went down. Particularly the hearing on the motion to quash the panel went down with the record, I'm sure, did it not?

MR. KECK: Yes, Your Honor.

THE COURT: Of course, the record is clear that I denied your motion to quash the panel at the end of that hearing, so I've already made a determination there. Again, in an abundance of caution, I will admit the evidence. Whether or not I will give it any weight is another question.

MR. KECK: Your Honor, if that concludes the stipulations offered by —

MR. CUNNINGHAM: I think at this point is where the Court decides whether or not we have made our prima facie case. We would ask the Court to—rule as to whether or not we have made our prima facie case.

THE COURT: Mr. Keck, do you want to argue on that point?

MR. KECK: Yes, Your Honor. I believe that in a typical Batson situation that might very well be true. **[12]** However, here the Court has the benefit of not only now having read the Batson opinion and Keaton and some of these other cases decided by the Court of Criminal Appeals, but it also has the advantage of knowing, I guess, because we have already been through one hearing on this topic, of essentially what is going. to be produced.

Specifically, the Court knows that, while the State exercised fourteen preemptory challenges, it had fifteen preemptory challenges. The Court knows that one black served on

this jury and that had continued to it from that, that had the state of mind to exclude blacks, that it certainly could have excluded the one back who did serve on the jury. The Court also knows that the racial composition of the jury consisted of members of other minority races. Finally, the Court knows that the Defendant agreed to the excuse of six members of the black race in exchange for the State, I presume, to excuse other veniremen. We think the Court should consider the ultimate composition of the jury because it knows what that is now and we think the Court should also consider the fact that the Defendant agreed to the excuse of these six black veniremen when it decides —I mean, I take it the thrust of the Defendant's complaint is I was tried by a jury on which there was only one black person. Part of that is—part of our point would be, the **[13]** reason there is only one black person was because you agreed to excuse six black people. Now, that's not the only reason, the only factor. There is also the State's exercising its preemptory challenge.

We would suggest that all of the relevant circumstances, just as Mr. Cunningham has said, all of the relevant circumstances surrounding the case, can be considered by the Court when it makes its determination of whether or not there is a prima facie case. We would suggest that those facts also ought to be considered. We are not suggesting that the explanation should be considered at this point. We would agree that that is—you know, in the typical course of a Batson hearing, that is not the way it would proceed. But these other factors relevant to the racial composition of some of these other groups we feel is before the Court and ought to be considered by the Court.

MR. CUNNINGHAM: Your Honor, in response to that, Batson clearly points out the facts that you may have one black. That is not the issue. The issue is whether or not the Defendant has—well, whether or not there has been a discriminatory selection process. That is our contention with respect to the ten that they used preemptory strikes on. It becomes even clearer, when the Court looks at the number

of strikes that were actually **[14]** used, fourteen, and then see that out of that fourteen ten were black. To say that there was a black, there was a Philippino, there was a Mexican, and there were two or three women that answers the problem, is not the answer because all the State could do is say, okay. We' re going to see which one we want and put him on there and that kills this Batson hearing. That is not Batson. They have to clearly show a specific reason for their use of preemptory strikes on each and every one of the minority, in this case black. The fact that they had one on there don't make any difference. I think that is Batson clearly.

MR. KECK: Judge, I'm not saying that just because a black served on the jury that answers the Court's inquiry. I'm not saying that, but I am asserting that is a factor that this Court can consider along with the fact that we had remaining preemptory challenges to exercise against that black venireman, so we have a situation in which blacks and other minorities served on the jury. To the extent that the State had unutilized preemptory challenges, it could have excluded all blacks from the jury. Now, it got some help from the Defendant's agreeing to excuse six other veniremen, but I'm just saying those are all factors that the Court should consider in determining whether these facts and circumstances raise an inference that the State exercised the preemptory **[15]** challenges that it did exercise against blacks based—you know, by virtue of a racially motivated reason.

THE COURT: Mr. Keck, I'm going to resolve this this way again maybe just because I'm extra cautious, because I think the Batson rule is still being expanded by the Court of Criminal Appeals. Keaton is the closest we've come to having a clear pattern of what to do. I'm going to ask and direct the State to go forward with an explanation of its strikes.

I will ultimately, of course, make the determination as to whether a prima facie case was even established or, if it was, whether or not the State's reasons were racially neutral and then, depending on what I do there, anything else if I go

that far. But I think a whole record is the thrust of the Court of Criminal Appeals' order.

I do note, unless you lawyers object—I kept notes during the voir dire myself and you mentioned six blacks were apparently excused by agreement. My notes indicate those were jurors seventeen, thirty, fifty, sixty-one, sixty-seven and eighty.

MR. CUNNINGHAM: What were they again?

THE COURT: I will give you the numbers. I have juror number seventeen, Mr. Gitchaway; number thirty, Mr. Randal; number fifty, Ms. Miller; number sixty-one, Mr. **[16]** Moseley; number sixty-seven, Ms. Collier; and number eighty, Mr. Tarry. Those are by agreement.

The record also probably needs to reflect from my same notes that in excess of sixty jurors out of a hundred and eight who were voir dired were excused by agreement. To go further, my understanding was, some of which is probably not on the record, by giving the various questionnaires to all the jurors, counsel on both sides, under the direction and instance of the Court, encouraged the lawyers to try to agree to excuse jurors who would like to be struck for cause or excused for cause if they were actually voir dired. I think both sides worked toward that end and only voir dired those jurors who appeared to be potentially seated jurors. For whatever value that is, I do not know.

At any rate, Mr. Keck, I would ask and direct the State to go forward with its explanation of striking those ten particular jurors. In doing so, I will say that I certainly will consider in making whatever rule I make in this case all of the voir dire including the composition of the jury, the agreements to excuse. I'm going to rely on my own recollection which might be refreshed by my own notes of various jurors and anything else that is before me. I want this to be a complete record.

Off the record, Pam.

[17] (Whereupon, an off-the-record discussion was held between counsel and the Court.)

THE COURT: Back on the record. Mr. Keck, do you want to go forward?

DIRECT EXAMINATION OF PAUL MACALUSO

BY MR. KECK:

Q Would you State your name, please?

A Paul Macaluso.

Q Would you tell the Court how you are employed, please?

A I'm an assistant United States attorney for the Northern District of Texas.

Q How long have you been so employed?

A Since the first of the year, basically.

Q That is 1988?

A Yes.

Q How were you employed prior to that?

A I was an assistant district attorney for Dallas County, Texas.

Q How long were you employed in that capacity?

A From February of 1973 until the first of this year, 1988.

Q Let me ask you if you are familiar with the case which has resulted in this retrospective Batson hearing, that case being the State of Texas versus Thomas Joe **[18]** Miller-El, Cause Number F85-78668-NL?

A Yes.

Q And did you have anything to do with the prosecution of that case?

A Yes.

Q Would you state for the record, please, what your duties in that regard were?

A I was one of three, basically three, assistant district attorneys assigned by the district attorney to prosecute that case.

Q I see. Who were the other assistant district attorneys?

A Mr. Norman Kinne was the lead attorney on the case, myself, and Jim Nelson.

Q Directing your attention to the voir dire examination, was Mr. Kinne present during that voir dire examination?

A Occasionally.

Q Was there any particular problem that he had; was he just preparing for trial or —

A I am assuming he was interviewing witnesses and he had other responsibilities as well. The voir dire, as I recall, took several weeks.

Q Was that kind of part of the game plan, that you-all —that you and Mr. Nelson would concentrate on **[19]** the voir dire and Mr. Kinne would then be lead counsel during the trial of the merits?

A That is correct.

Q From time to time did you, however, consult with Mr. Kinne about the exercise of certain of the State's preemptory challenges?

A Occasionally.

Q Not very often?

A Correct.

Q That would be rare, in fact, that you would do that?

A Pretty rare.

Q Let me direct your attention to—well, I'm sorry. Let me go over a couple of more general matters. As you and Mr. Nelson were interviewing the jurors through the voir dire process, let me first ask you whether or not there were jury questionnaires utilized in this case?

A Yes, there were.

Q Those were written forms?

A Yes, sir.

Q And they were passed out to the jurors prior to the time they appeared to be individually examined?

A Yes, I believe in every instance, virtually every instance.

[20] Q And copies have been made of those of the answers that they had written onto the forms and then those copies have been provided to attorneys for both parties and to the

Court?

A Yes.

Q Let me ask you if you had an occasion this morning to review the rather large box containing the district attorney's trial files concerning this case?

A Yes.

Q Were you able to find the State's copies of the juror questionnaires in that box?

A Some.

Q Were you able to find any of the questionnaires relating to the jurors who were preemptorily challenged?

A No, sir.

Q Did the forms that you have relate to the jurors who, in fact, served—or the veniremen who, in fact, became jurors on the jury?

A Yes, that's correct.

Q When you and Mr. Nelson were devoting your attentions to this process, who between you was the senior attorney assigned to the case to represent the State?

A I was.

Q Prior to this trial, how many capital penalty juries have you selected yourself or participated in the **[21]** selection of?

A I don't know for sure, but I—

Q Just a rough guess.

A Ten maybe, maybe more, maybe less.

Q How many had Mr. Nelson selected, if you know?

A I don't believe he had done any. This was his first.

Q So you kind of took the lead?

A More or less.

Q Let me ask you: Did you ever come to a point in deciding whether or not to exercise a State's preemptory challenge, that you and Mr. Nelson disagreed about whether or not a preemptory challenge should be exercised against a particular venireman?

A Not that I can recall.

Q If such an eventuality had occurred who, between you and Mr. Nelson, would have been able to make the decision on behalf of the State of Texas?

A In all probability I would have.

Q And possibly you might have consulted with Mr. Kinne in a close situation?

A That's possible, yes.

Q All right. Let me direct your attention then to venireman number one 0 two. That's Mr. Paul Bailey. I believe yesterday afternoon after the Court had instructed **[22]** its coordinator to call me and inform me that we were having the hearing on this matter this morning, you and I met outside the federal courthouse and I gave you a copy of the court reporter's transcription of the voir dire of Mr. Paul Bailey; is that correct?

A Yes, sir, that's correct.

Q It was in a plain brown envelope which I see you brought with you to the witness stand?

A As you see it, yes.

Q I would like to direct your attention, if I could, to page 4167 of that document.

THE COURT: What juror was that?

MR. KECK: This is Paul Bailey, Your Honor, number one 0 two. This is one of the venireman where no explanation was actually given in the record.

THE COURT: We're assuming that I'm going to review the voir dire record for explanations plus anything else I hear at this hearing?

MR. KECK : Your Honor, as to the explanations which we are giving, as to the eight black men for whom explanations appear, it is my intention to ask the Court simply to take judicial knowledge of those things. I have asked Mr. Nelson to come in simply so that he can be here for any questions the Court might want to ask him about those reasons. If the Court pleases I can have Mr. Nelson **[23]** read those reasons into the record.

THE COURT: They are in front of me. I've already reviewed them preparatory to the hearing today. I will be glad, of course, to hear anything else you want to say but, if we can focus on what we have to have, it would be better for everybody.

Q (By Mr. Keck) Now, have you found that passage in your copy of the statement of facts?

A I've found page 4167.

Q All right. Would you —

MR. CUNNINGHAM: Could we take a minute, Your Honor—could we get your copy back there?

THE COURT: Sure.

(Whereupon, there was a short break, after which the following proceedings were held.)

THE COURT: Let's get back on the record. Mr. West was excused because he had a matter that he had a conflict with and Mr. Cunningham has, of course, no problem with continuing the hearing.

MR. CUNNINGHAM: None whatsoever, Your Honor.

THE COURT: Go ahead, Mr. Keck. I think when I interrupted you-all, Mr. Macaluso was just about to be asked about his reasons for challenging juror Bailey.

Q (By Mr. Keck) Mr. Macaluso, early on in your **[24]** examination of Mr. Bailey, you had begun questioning him about his beliefs about the death penalty and he had indicated certain religious or personal reservations about imposing the death penalty. You had, in fact, challenged Mr. Bailey based on Witherspoon versus Illinois and Wainright versus versus Witt; is that basically correct?

A Yes.

Q Defense counsel examined Mr. Bailey on this point and finally on page—the page that is directing your attention, the Court even indicated on line twenty-two and twenty-three on page 4167—could you read that to the Court just to remind the Court of what was said?

THE COURT: Do you have the record now?

MR. CUNNINGHAM: No, sir. I will use his when he finishes.

Q (By Mr. Keck) Page 4167, beginning with line twenty-one, really.

A "THE COURT: I'll give you-all a few minutes. It's a good question that has been raised." Then parenthetically, "(Whereupon, there was an off the record discussion between counsel and the Court, after which the following proceedings were held.)" "THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it." It just says, "MR. MACALUSO: Judge, in light of the Court's ruling and **[25]** in light of the statements made by the Court, we'll use a preemptory challenge.

Q Now, let me ask you, Mr. Macaluso, at that point the Court had overruled this Witherspoon challenge after having indicated that the Court at least felt it was a good or a close question and at the point that you exercised the preemptory challenge, let me ask, you why you did that as to Mr. Bailey?

A From the record, which I have reviewed, it became obvious—I'm just rereading the record—from the very beginning that Mr. Bailey had expressed religious, moral, and personal views in opposition to the death penalty. I thought he was very explicit about that. I felt at the beginning of the examination, throughout the examination, and at the end of my examination that's how he felt even though he did change his position somewhere after he was examined by

change his position somewhere after he was examined by Mr. Cunningham. I just felt that he would not be able to fulfill his responsibilities as a juror in light of any evidence and I exercised a preemptory challenge.

Q In any event, he wasn't, in your view, an ideal State's juror by any stretch of the imagination?

A Definitely not.

Q Because of these reservations he had about the imposition of the death penalty?

[26] MR. CUNNINGHAM: Judge, object to counsel leading.

THE COURT: Don't lead.

Q (By Mr. Keck) Let me direct your attention then to—I'm sorry. Did the race of Mr. Bailey play any role whatsoever in your decision to exercise a preemptory challenge?

A None whatsoever.

Q If anyone, regardless of race, had given similar answers to his, is it your testimony that you would have utilized a preemptory challenge on such a venireman?

A Without question.

Q Even if it was your last preemptory challenge? I know it wasn't in this case, but —

A No, it wasn't. I have never been in that position but, yes, I would have to say—I guess I'm speculating to a degree but, yes, I would have had to given his statements in opposition to the death penalty.

Q Now, directing your attention to Venireman Joe Warren, which was the other venireman that I provided you a copy of that voir dire—

MR. KECK: Your Honor, this is the other venireman for whom no explanation was given.

THE COURT: What number was—

MR. KECK: He was number twenty-eight, Your **[27]** Honor.

Q (By Mr. Keck) Now, Mr. Macaluso, Mr. Cunningham has already stipulated that this was juror number twenty-eight and that this was the State's number six preemptory challenge; in other words, the sixth preemptory challenge exercised by the State in toto on Mr. Warren. Would you describe that as early or late in the voir dire process?

A I would describe it basically as early.

Q Would you state for the Judge—I'm sure he is probably familiar but also for the record and the Court of Criminal Appeals. Would you just briefly detail perhaps how your philosophy about exercising strikes changes as we go through the voir dire process from early voir dire to late voir dire, if there is a change?

A Sure. Naturally I prefer to think that I was being conscientious and careful throughout a serious process such as this. I think it is inevitable that early on when you're starting off, of course, examining prospective jurors and you have fifteen strikes that you have the, I don't know if you could call it, luxury for lack of a better phrase or word of using strikes and being extra careful, I suppose.

I'm sure, if I were to go back and examine strikes that I exercised early on in voir dire, I might have found—in fact, I have had judges kind of kid me **[28]** about exercising a strike on somebody who, I later said, I wish I had that strike back later on because you never know what kind of a venire person you're going to encounter later on in the examination.

In answer to your question partially, yes, you're probably more likely to use a strike early on on somebody and you would obviously come down to having used twelve or thirteen. It is just more precious, I guess, is a way of putting it.

Q Of course, the other fact is, you're counting jurors who have actually been selected, too?

A Sure. I left that out. Of course, obviously if you have used twelve or thirteen strikes and you have eleven jurors, that's one thing. If you have used nine or eight strikes and you have two jurors, it is quite a bit different.

There is a ratio, I suppose, of the number of strikes you have remaining to the number of jurors you need to complete the jury.

Q Now, directing your attention back to Mr. Warren, just to we understand, in light of that explanation that you just gave, Mr. Warren's—the decision on Mr. Warren came at a point in which you probably weren't being extra careful—

A Yes.

Q — for lack of a better word?

[29] A I guess you could say that.

Q Because you still had nine preemptory challenges left even after exercising against Warren?

A I don't recall exactly where in the voir dire examination this particular venire person fell. Assuming that the pages are numbered such this page is in the low fifteen hundreds and Mr. Bailey was number forty-one hundred, so there would be some significant distance before Mr. Bailey.

Q Mr. Bailey, just to refresh your memory, was juror number a hundred and two. Mr. Warren was juror number twenty-eight. I realize that they were probably not all called exactly in order, but —

A No, and some jurors were excused.

Q Twenty-eight might be even called before twenty-seven?

A Right.

Q Would you state for the Court your reasons for ultimately exercising a preemptory challenge against Venireman Warren?

A I have had a chance to review what appears to be about forty pages of my examination of Mr. Warren and the examination by Mr. Cunningham, I believe. I have noted a few things that tends to refresh my memory with regard to our decision in this case. I'm looking at page—for **[30]** example, on page 1543 at the bottom there at line twenty-three where he was asked by me, "I gather you feel pretty

strongly about murder, do you not? I mean, it goes without saying?" His answer was, "well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should." He had some answers there, and I've got some other pages marked, that made references to—I thought they were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more. Again, I don't have the benefit of the questionnaire itself. Frequently we have information on there that kind of guides us on some of the questions we ask.

He goes on in, I believe, some of the examination by Mr. Cunningham—and I imagine this would be on the questionnaire, if it were filled out. He makes reference to a brother, I believe, who had been recently convicted. By the way, the section I was referring to just a moment ago about these unusual feelings he had about whether someone is really being punished by the death **[31]** penalty or not and ambivalent to—on page 1532 basically lines nine through seventeen.

Q Could you just read those, Mr. Macaluso, so we could all be reminded of them?

A I assume I'm asking about what the death penalty accomplishes and the question before that was, "What do you think it accomplishes when you feel it does?"

Answer, "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

Back to what I was referring to about—and I believe it is in response to some questions by Mr. Cunningham on page 1556. On line four there is a reference to apparently some-

thing that had happened to the venire person's son. There is a question beginning on line four, a question by Mr. Cunningham, "This mishap that your son was involved in, was that Bengy or Joe, Jr.?" Answer, "That was Joe, Jr." Question, "Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?" "No."

It goes on, question, "That was something at [32] school?" "Yes, it was." I don't recall in reading my examination of Mr. Warren any mention in particular was made of that initially. I don't know how the time ran on that, but I gather there was something on the questionnaire. I don't have the questionnaire before me nor have I had a chance to see it before I testified here.

At the bottom of page 1556 beginning with line twenty-four, actually line twenty-two, question, "Was your brother-in-law a victim of a crime in Las Vegas?" Answer, "My brother. Yes." "Okay. What type of crime was it?" Answer, "I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money."

Question, "How long ago was that, sir?" Answer, "That was about a year and a half or two ago."

Those are the basic reasons. Without the benefit of the questionnaire, we just felt that he—you know, at that juncture and at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a preemptory challenge. We did not think he would be a favorable juror for the State.

Let me ask you the same question that I asked you about Mr. Bailey, if this particular venireman, that is [33] Mr. Warren, had presented himself at a time in which you have one more challenge to exercise, one more preemptory challenge, would you have been as likely to think about utilizing it?

A No, I would not have.

Q Also, part of it was just at this point in voir dire Mr. Warren gave his answers and he was not as clearly disfavorable to the State as Mr. Bailey?

A That's correct.

Q And I think you have indicated that Mr. Bailey was, in your judgment, pretty—about as unfavorable as one could get?

A To the point that we submitted him for cause.

Q With regard to Mr. Warren, did the race of this venireman play any role whatsoever in your decision to exercise a State's preemptory challenge against him?

A No.

MR. KECK: Your Honor, we will pass the witness.

THE COURT: Mr. Cunningham, do you wish to cross-examine?

MR. CUNNINGHAM: Yes.

MR. KECK: Your Honor, could the record reflect that I have tendered to Mr. Cunningham the State's copies of the transcript of the voir dire of both Mr. Warren and Mr. Bailey. He has those available to him for cross- [34] examination or whatever purpose he would like to use them.

THE COURT: Mr. Cunningham, do you need any time to look through those?

MR. CUNNINGHAM: My understanding is that the . Court is going to review those?

THE COURT: Correct. Before I decide anything in this case, I will would like the opportunity to reread the testimony myself at least of these two jurors and probably all of the jurors that were challenged.

MR. CUNNINGHAM: Just so the record will reflect, they were submitted to counsel for the Defendant while the hearing was in process.

CROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM

Q Mr. Macaluso, did I understand you to say that the reason why you may exercise a preemptory challenge early in the selection process may differ when you have used a large number of your preemptory challenges?

A That's correct.

Q So that you start out in the beginning and your selecting process in the beginning—for example in this case beginning on February 5, 1986, when you struck Mr. Bozeman and when you struck Mr. Bailey on March 5, 1986, Mr. Bozeman being number one and Mr. Bailey being with thirteen strikes, your reason for striking Bozeman vis a **[35]** vis Bailey is different?

A That would largely be true. The same considerations are made but I—that largely would be true.

Q So that the more strikes you use and the least number that you have affects how you look at a prospective juror and particularly a black juror as the process goes on?

A No, not with regard to a black juror in that consideration or any other color juror, for that matter. something else is left out. It is just not the number of strikes. As Mr. Keck pointed out, it is the number of jurors that remain to be seated. I can recall, for example, a situation in this particular case where I can recall vividly one of the persons who was on this jury, I will be honest with you, I would have struck him. If he had been in Mr. Warren's position, I would have struck him faster, if there is such a thing, than I did Mr. Warren.

Q You said what?

A I can recall there was a juror on this case that I would have—that we accepted. I think he was either the eleventh—I believe he was the eleventh juror, maybe the tenth juror. I can't recall which, but way on in the process, that I would have —

Q I can't hear you for that door. Now, you were **[36]** saying?

A I was saying that I can recall specifically—I can recall two people that I probably would have struck if they had

appeared in the array earlier on, say, if they had switched places and been number twenty-eight where Mr. Warren was. I can recall two individuals that, if I had them occur then, I would have struck them. It occurred later on when we had more seats to fill, we had fewer strikes, and I had to take a chance on them.

Q Were these people that you are talking about actually selected?

A Yes, sir.

Q One of them was a Philippino?

A No.

Q One a Spanish sir name? [sic]

A He had a Spanish sir name. [sic]

Q So the other one was a black?

A No. It was a white female.

Q Was that juror number twelve?

A I think we're thinking about the same person.

THE COURT: Juror number one 0 eight, I believe.

Q (By Mr. Cunningham) Ms. Sandra Hearne?

A Nothing personal against either of those jurors, I might add.

Q You did not strike Ms. Sandra Hearne, juror **[37]** number one 0 eight?

A If she was the last juror seated, that's the one.

Q She was the last juror seated.

A Right.

Q And was seated when you had one strike left; is that correct?

A I would have to take your word for it. I'm not denying that it probably is accurate. I think she was the last juror seated. I think we did have one strike left.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Is that all, Mr. Keck? I just have one question that may already have been asked, but why don't

you go ahead and finish. I just have a couple of questions which you may have asked and I just didn't hear them.

REDIRECT EXAMINATION OF MR. MACALUSO

BY MR. KECK:

Q Mr. Macaluso, just so we understand, as voir dire progresses, I didn't understand you to say that your feelings about any particular venireman changed. In other words, you like them or dislike them just as much as you would have, but your reluctance or eagerness to exercise a pre-emptory challenge against this sort of marginal venireman, that may change as the voir dire progresses and **[38]** you have used more of your challenges?

A That would be true. A large part of it or at least a substantial part of it is that as things begin to wind down, as you get eight, nine or ten jurors, you can better calculate obviously. You know how many people you need and how many strikes you have left. You can look down the list of people that you have questionnaires, which we examine, and we can make some judgment calls on people we feel would be better suited towards the case in our opinion. We can better estimate how many strikes we're going to need and take those into consideration and some of the strategies that come into play, I'm sure, on both sides in that regard in using strikes at that time. It is much more difficult to do early on in the voir dire.

MR. KECK: Thank you.

RECROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Warren did not say anything that indicated to you that he would be unfair to the State?

A Well, he didn't say in so many words, no, but I have to go just from my review of his examination on the basis of some of his answers and some of his positions and the other information about his having some family members who had either been convicted of crimes or were on probation or whatever, that I felt he would be more biased **[39]** towards the Defendant in the case.

MR. CUNNINGHAM: That's all, Your Honor.

EXAMINATION OF MR. MACALUSO

BY THE COURT:

Q Mr. Macaluso, you have testified to your strategy in selecting the jurors in a capital murder case. And you have participated in voir dire in capital murder selections; is that correct?

A In others?

Q Yes.

A Yes.

Q Can you give me any number?

A How many all total?

Q A ball park figure.

A Maybe fifteen—not as of that time. Maybe ten at that time.

Q This may not be relevant, but maybe it ought to be in the record. I believe our manner of doing voir dire was to bring up fifty jurors each Monday, to qualify fifty, and then commence to conduct voir dire through that list and then at the end of the week quit and bring up fifty new ones on Monday. Is that how we did this case? Did I recall it correctly?

A Yes.

Q Which again may or may not affect the strategy **[40]** of either side in exercising their strikes; in other words, not knowing what is going to come the next Monday?

A I don't recollect there was a special venire in this case.

MR. CUNNINGHAM: There was not a special venire. In fact, we started with a brand new panel the following Monday.

A I do recall now that I believe Mr. Nelson and I would alternate with Mr. West when making shuffles, I believe, down in the central jury room on the various Mondays.

Q I recall many shuffles. That's why I asked that question.

MR. CUNNINGHAM: There was a shuffle each Monday.

THE COURT: That's all I have.

MR. CUNNINGHAM: This is also true, I think, that if there were ten, eleven, or whatever the number was, that were not reached when we broke on Friday, every one after that number was excused from service.

THE COURT: I think that is true.

MR. CUNNINGHAM: And then on Monday we started the process all over again with a brand new panel.

MR. KECK : Your Honor, before Mr. Macaluso is excused I should mention that, in fairness to Mr. **[41]** Cunningham, I intend as to Venireman Bozeman, venireman number seven, to ask the Court to take judicial notice of the explanation that was given for the exercise of the State's preemptory challenge against Mr. Bozeman. That explanation was given by Mr. Macaluso and it appears in volume number one, really, of the voir dire, which is page 323 and 324, according to my records.

THE COURT: You have set that same matter out in your motion for rehearing your brief. Is that what you are referring to?

MR. KECK: Yes, Your Honor.

THE COURT: I have that in front of me.

MR. KECK: I mention it only so that perhaps we can excuse Mr. Macaluso. I did mention it in the brief, but I have the reason here—it may be that Mr. Cunningham would like some opportunity to cross-examine Mr. Macaluso on that reason before he leave the stand. Mr. Nelson provided the State's reasons for the exercising of the State's challenge as to the other seven veniremen. He is also available to be cross-examined. I just thought we might give Mr. Cunningham that opportunity now.

MR. CUNNINGHAM: Your Honor, if I had wanted one, I would have used —

THE COURT: Beg your pardon?

MR. CUNNINGHAM: As far as I am concerned, Mr. **[42]** Macaluso can be excused if the State has no further questions they want to ask him. The defense has asked him all the questions they want.

THE COURT: Anything else, Mr. Keck?

MR. KECK: No, Your Honor.

THE COURT: Mr. Macaluso, you can be excused. Thank you, sir.

Mr. Keck, does the State have any additional evidence it wants the Court to consider on the hearing?

MR. KECK: Not at this time, Your Honor, other than the fact that we would like the Court to take judicial notice of all of the explanations for the other eight veniremen. Those are set forth in our motion, but you might want to write down—I'm not sure that it says as to all of them the specific place in the record.

Now, the State and the appellant used a numbering system for the—because of the edition of the transcript, there may have been two transcripts or a preliminary hearing that was also reported, but the numbers that I have used in my brief do not correspond to the numbers of the voir dire. For example, the volume number ten of the voir dire, we refer to in our brief as R-12. In other words, there are two more added onto it. There are references in my motion that reflect the two plus, if you will, system of indicating the volume of the transcription.

[43] As to Anna Keaton, the explanation provided by Mr. Nelson to the Court is found at volume thirteen, page 4373.

MR. CUNNINGHAM: Wait a minute. Volume thirteen, page what?

MR. KECK: Page 4373.

THE COURT: That is the numbering system that is in the Court of Criminal Appeals'; is that correct?

MR. KECK: Yes, Your Honor. If you went back and looked at these volumes, it would appear to be like volume eleven, Volume XI.

MR. CUNNINGHAM: Where do you get thirteen?

MR. KECK: Well, we call this R-13 because, you know, R-1, our transcript—I think maybe there were two transcripts or maybe there was some preliminary hearing even before voir dire that was really R-2. See, what I'm getting at is, it says ten but really we both called it R-12. On the cover of it, it says volume ten of voir dire.

With regard to venireman Mackey, the explanation is found at Roman numeral thirteen, 4374. I believe also at that page, the Court itself recognizes that it can see that juror Matthews is not an ideal juror although the challenge for cause is overruled by the Court.

We've already gone over Juror Bozeman. With regards to Venireman Fields, that explanation is found at **[44]** page 450 of the first volume of the voir dire. That's R-3. Again, that explanation was provided by Mr. Nelson. I think that explanation is perhaps reiterated in the State's motion that the Court has been provided with.

With regard to Venireman Rand, that explanation by the State is found at Roman numeral six at 1855 and 1856. I believe that is also set forth in our motion, judge. The voir dire of Venireman Rand begins at 1805, Your Honor.

With regards to Venireman Bogges, number forty, the explanation given by the prosecutor, again that was Mr. Nelson in giving the explanation, is at Roman numeral six, 2043.

With regard to Venireman Kennedy, Mr. Nelson's explanation appears at our Roman number seven dash 2939 through 2940 and I believe that is also reproduced in our brief, Your Honor.

The final explained venireman that Mr. Nelson provided explanations at volume ten, page 3017 through 3018.

We would ask the Court to take judicial notice of all those explanations and we would submit that they were given at a time that the prosecutors had both discussed the mutter and reflected the contemporary reason before this case has been remanded. I would also like the **[45]** record to reflect that I know the Court whenever it recesses has seen Mr. Nelson and Mr. Nelson has been in the witness room and he is ready to be cross-examined on any of these reasons by Mr. Cunningham if that is his desire. I don't think it would serve the State's purpose or interest to examine him seeing as the reasons are all in the record and available for the Court's consideration.

THE COURT: Thank you, Mr. Keck. Mr. Cunningham, I will give you a chance to reply to any of that, if you wish, but are both sides prepared to close evidence now?

MR. CUNNINGHAM: Yes.

MR. KECK: Yes, Your Honor.

THE COURT: I'm going to, of course, reread the voir dire of the ten challenged jurors. I did read some of it already after you filed your earlier motion with the Court of Criminal Appeals. I found what I read consistent with your summary and your motion, so I don't suspect that it is not accurate.

Do you-all wish to make argument on this at this point in time? I don't know if this is particularly a fact-finding hearing as I understand the Court of Criminal Appeals' mandate, but I certainly think there is a position that one side or the other can take.

MR. KECK: Your Honor, I would just submit to **[46]** the Court that the Court itself—and you might also want to make a note of this: At page our Roman numeral fourteen dash twenty-two, the Court found that on every strike where the defense asked for an explanation, the State has provided satisfactorily to the Court it as not being racially motivated. That was before Batson came down, before anything that maybe challenges or changes the way the Court is thinking about things. I think that is an important finding.

As to those eight veniremen, black veniremen, who were peremptorily challenged by the State, this Court at the time the matter was fresh in its mind felt that the prosecutor's explanations satisfied the Court that they were not racially related reasons.

In Keaton versus State—now, this is the last Keaton, Keaton number three, the one that was decided on April 6th, 1988. I know the Court has read this. On page eight and nine, the Court of Criminal Appeals in Keaton refers to these five factors which will weigh heavily against the legitimacy of any explanation which is offered by the prosecutors. Those factors are, first, that an explanation based on group bias where the group trait did not show to apply to the challenged juror specifically. I would submit to the Court that there has been absolutely no indication that any of the explanations are subject to this first factor.

[47] Second, that no examination or a perfunctory examination of the challenged juror. Again, I would submit that the court can see that all of these black veniremen were examined extensively. This isn't a situation where the State just asked a few questions of the black veniremen and then struck them. The implication of that, of course, would be, well, we were going to strike them all along because they were black. That certainly didn't happen in this case.

The third factor, just for an examination of the challenged juror, i.e., questioning a challenged venire person so as to evoke a certain response without asking the same question of other panel members. Here there probably were certain questions that were asked of certain of these black veniremen who were challenged by the State that were not asked of all the veniremen. But to the extent that that occurred, the State would suggest that—for example, Mr. Bailey, he had indicated on his form, and it is clear through the whole context of his voir dire, that he had his opposition to the death penalty.

Of course, the white and other nonwhite veniremen who didn't make those responses, they weren't questioned about them as thoroughly—or heir feelings about the death penalty as thoroughly as the jurors who did indicate a reservation about imposing the death penalty. **[48]** Our point would be, to the extent that there was a just for examination, it can be explained by nonrace-related factors. Probably in most cases, the jurors answered these questions that the prosecutors testified they relied on.

The fourth factor, the reason given for the challenge is unrelated to the facts of the case. I think there is none of these situations where it can really truly be said that the reasons given were not somehow related to the facts of the case.

Finally, this is for a treatment where there is no difference between the responses given in an unchallenged venire person. At no time has the Defendant urged that there are unchallenged venire persons who did not have these same traits that the prosecutors testified either at trial or in this hearing that they relied on in exercising the State's preemptory challenges.

We urge the Court to conclude that there is no reason to discount the explanations given by the prosecutors at this hearing or at the time they were called upon to give explanations at trial. For that reason, the Defendant has failed to show that the explanations, which were given by the prosecutors, were incorrect or should not be accepted by the Court. The State has gone forward with its burden of producing evidence and the Defendant has failed to sustain his burden of proof on the issue of the **[49]** racial-related reasons. For that reason, we think this Court should find that none of the State's preemptory challenges were exercised for a racially-related motive.

THE COURT: Mr. Cunningham, do you want to reply to that?

MR. CUNNINGHAM: Not at this time, Your Honor. We may at a later date after we review the record and also, hopefully, by the time we have an opportunity to review the facts of this particular hearing—then we may ask the Court to let us present oral argument, but it would be after we get—after we have an opportunity to review the record voir

dire of these ten and also look at the hearing today as the Court is going to do.

MR. KECK: Would the Court prefer to have some sort of proposed findings of fact?

THE COURT: Mr. Cunningham, without prejudging the case, I'm going to find at this point, based on what I've heard today and my recollection of it all, to agree with Mr. Keck's position, but with this qualification: I want the same benefit of everything that you've talked about and that is to review the records myself. I'm going to ask Mr. Keck though, in anticipation of this hearing that we're going to have, to prepare some proposed findings and conclusions so that he can furnish the defense a copy, of course, and I will have those in front of me at the time **[50]** that we have our hearing.

MR. KECK: It may be useful to have Mr. Cunningham prepare findings also and then you will have both of them.

MR. CUNNINGHAM: If you want me to, I will prepare findings establishing a prima facie case. You can then prepare yours where you say there are specific reasons with respect to the ten and we would ask for a few days after his reasons for the ten so maybe we could have some counter findings of facts.

THE COURT: Mr. Keck, can you get your proposed findings in by next Monday? Is that too soon in view of the fact the record we had here today won't be—or is that too soon?

MR. KECK: I need a couple of days after the record is—

THE COURT: Off the record.

(Whereupon, the proceedings in this cause were concluded.)

[51] STATE OF TEXAS
COUNTY OF DALLAS

I, PAMELA SMITH, Official Court Reporter in and for Criminal District Court No. 5 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings directed to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand, this the 16th day of May, A.D., 1988.

/s/ PAM SMITH
PAM SMITH
OFFICIAL COURT REPORTER
Certification No. of Reporter: 112
Date of Expiration of
Current Certification: 12-31-88

CRIMINAL DISTRICT COURT NO. 5
Dallas County Courthouse
600 Commerce
Dallas, Texas 75202
214/749-6696

IN THE CRIMINAL DISTRICT COURT NO. 5
DALLAS COUNTY, TEXAS
NO. 8668-NL

THE STATE OF TEXAS
vs
THOMAS JOE MILLER-EL

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND FROM THE COURT OF CRIMINAL APPEALS I.

I
PROCEDURAL HISTORY LEADING TO REMAND

Thomas Joe Miller-El, hereinafter referred to as "Defendant," was charged by indictment with capital murder. Following jury voir dire conducted in February and March of 1986, the Defendant was found guilty of capital murder and sentenced to death. The Defendant appealed his conviction to the Court of Criminal Appeals, raising *inter alia*, a claim that the prosecutors who selected the jury in the instant case violated the principles enunciated in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986).

On March 3, 1988, the Court of Criminal Appeals returned an opinion which abated the appeal to this court with instructions to "conduct further proceedings not inconsistent with this opinion and *Batson*" and to forward the record of those proceedings and Findings of Fact and Conclusions of Law to the Court of Criminal Appeals. Opinion of March 3, 1988, 748 S.W.2d 459,461.

The State filed a motion for rehearing which was denied by the Court of Criminal Appeals on April 27, 1988. In the interim, the Court of Criminal Appeals had decided *Keeton* v. *State*, 749 S.W.2d 861 (Tex. Crim. App. 1988) (opinion following abatement).

Accordingly, in its opinion of April 27, 1988, denying the State's motion for rehearing, the Court of Criminal Appeals stated:

> This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in *Keeton* v. *State* ...
>
> Order of 4/27/88.

Because the State's Motion for Rehearing sought to clarify the issue of whether this court could determine whether a prima facie case of purposeful discrimination had been established by the Defendant, this Court deems the use of the phrase "full procedure and steps outlined in *Keeton*' in the order of April 27, 1988 to have added significance[1] and has interpreted the use of this phrase to mean that this Court is to perform all the prongs of the analysis set out in *Keeton*.

II
THE RETROSPECTIVE *BATSON* HEARING

On May 10, 1988, this court conducted a hearing on the *Batson* issues. At that time, the court noted that certain facts were not in dispute or could be stipulated by the parties. S.F. 4-15.[2]

This Court withheld its rulings on the prima facie showing issue and, without objection from either party, asked the to produce its reasons for striking the ten black veniremen. S.F. 15-16.

The State then called Mr. Paul Macaluso, an assistant United States attorney, who, at the time of trial, was the

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[1] It may be that the Court of Criminal Appeals' original opinion ordering a remand to this court also authorized this court to make the prima facie case determination:

> However, it is not for this Court to say whether there was any racial motiation in the prosecutor's actions. Batson requires such a determination being made by he trial court. *Miller-El*, *supra*, at 460.

[2] The court reporter's transcription of this hearing has been typed. It is referred to throughout this set of Findings as: S.F. ____.

Dallas County Assistant District Attorney in charge of the State's voir dire in the instant case. S.F. 17-18; 20-21.

Mr. Macaluso then testified concerning the reasons that the State had exercised peremptory challenges against venireman, No. 102, Paul Bailey. S.F. 21-26. Basically, he testified that he exercised peremptory challenge against Bailey due to the opposition to the death penalty which Bailey had expressed in jury questionnaires and during voir dire. He also testified that race played no part in his decision to strike Bailey.

Mr. Macaluso also testified concerning the State's reasons for striking Venireman Joe Warren. S.F. 26-33. In sum, these reasons included the fact that Warren's brother was a convicted felon, that Warren had given what the State regarded to be inconsistent responses to questions during voir dire regarding the death penalty, and certain answers concerning an incident involving Warren's son. All of these factors led the prosecutors to conclude that Warren would not be a juror favorable to the State. Race played no part in deciding to strike Warren.

The court indicated that it would consider the reasons provided by the State at trial for striking of the other eight black veniremen. S.F. 16; 34; 44-45.

III.

UNDISPUTED FACTS AND LEGAL ISSUES

The following facts, which are relevant to the *Batson* issues before this court, are not disputed:

1) The Defendant is black, and, therefore, he is a member of a "cognizable racial group" for purposes of *Batson*.
2) That jury voir dire occurred in February and March of 1986, well before the return of the Supreme Court's opinion in Batson.
3) That during the course of the individual voir dire process, the State exercised 14 of its 15 peremptory challenges.

4) That the State exercised 10 of these 14 peremptory challenges against veniremen of the Defendant's race.
5) That six other black veniremen were excused by the agreement of the parties.
6) That the jury selected and impaneled had nine white jurors, one Hispanic juror, one black juror, and one Filipino juror.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DISPUTED ISSUES

A. Prima Facie Case

At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the state's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding; rather, the court has considered the entire voir dire process, including the undisputed facts set forth in Part III, supra, and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing. In this regard, this Court has considered the procedure outlined by the Supreme Court of Missouri in *State* v. *Antwine*, 743 S.W.2d 51 (Mo. banc 1987), an opinion quoted extensively by the Court of Criminal Appeals in its opinion in *Keeton* v. *State*, supra. *See*, 749 S.W.2d at 865-66. In Antwine, the Court stated:

> As a practical matter, the third element of the prima facie case under Batson—"facts and any other relevant circumstances raise an inference that the prosecutor used (his peremptory challenges) to exclude the veniremen from the petit

> jury on account of their race"—requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.
>
> *Antwine*, 743 S.W.2d at 64.

B. Reasonableness of the State's Explanations

Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue. The Court has considered the reasons given at trial and those offered at the hearing on remand. As to the ten black veniremen in question, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.
2. The Court finds that the explanations given by the prosecutor in each case were completely credible.
3. The Court finds that explanations given by the prosecutor as to each venireman were completely sufficient as to content.
4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not shown to apply to the challenged veniremen specifically.
5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.

6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.
7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.
8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.
9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.
10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

SIGNED THIS 13 day of January 1989.

/s/ Pat McDowell

PAT McDowell, Judge
Criminal District Court No. 5
Dallas County, Texas

NO. 69,677

THE STATE OF TEXAS,

Appellee,

v.

THOMAS JOE MILLER-EL,

Appellant.

Appeal from the Criminal District Court No. 5
[DALLAS County]

OPINION

Appellant was convicted of Capital Murder for shooting to death an Irving motel clerk during the course of committing Robbery. *See* V.T.C.A., Penal Code, Section 19.03 (a)(2). The historical facts of this case are reported at *Miller-El* v. *State*, 782 S.W.2d 892, 893-894 (Tex.Cr.App. 1990). Punishment was assessed at death. *See* Art. 37.071 (b), V.A.C.C.P. Appeal to this Court is automatic. *See* Art. 37.071(h), V.A.C.C.P.; Tex.R.App. Proc. 40 (b) (1).

I.

In his first seven points of error appellant makes various complaints related to the allegedly intentional exclusion of black veniremembers from jury service by the prosecuting attorneys in this case. *See Swain* v. *Alabama*, 380 U.S. 202 (1965); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). To the extent that these points implicate a claimed Sixth Amendment right to a petit jury reflecting a fair cross-section of appellant's community, we note only that such right has not been recognized by the Supreme Court, nor is its recognition by that Court anticipated by this one. *Holland* v. *Illinois*, 493 U.S. 474 (1990); *Seubert* v. *State*, 787 S.W.2d 68 (Tex.Cr.App. 1990).

Nevertheless, the original appellate record in this cause does disclose that appellant is himself an African-American and that a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a *prima facie* case of racial discrimination in the jury selection process, contrary to the Fourteenth Amendment. Because *Batson* v. *Kentucky*, 476 U.S. 79 (1986), was not decided until after trial of this cause, we abated the appeal and remanded for an evidentiary hearing in the trial court on the ultimate question of intentional discrimination. *Miller-El* v. *State*, 748 S.W.2d 459 (Tex.Cr.App. 1988). *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987). We have received the supplemental transcript and statement of facts from this hearing, including the trial judge's findings of fact and conclusions of law. Based upon our independent evaluation of the supplemented record, we are of the opinion that no error is shown.

With respect to each black veniremember against whom the State exercised a peremptory challenge, a racially neutral explanation, reasonably related to the trial of this case, was offered by prosecution witnesses. *See* Appendix A. Thus, it became appellant's burden to prove by a preponderance of the evidence that such explanations were untrue in fact and that one or more African-American veniremembers were indeed struck by the State on account of their race. *Tompkins* v. *State*, 774 S.W.2d 195, 201-202 (Tex.Cr.App. 1987).

We have carefully reviewed the *voir dire* examination of these prospective jurors and find ample support there for the prosecutor's racially neutral explanations. *See Young* v. *State*, 826 S.W.2d 141 (Tex.Cr.App. 1992). Accordingly, we do not believe that such explanations are patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law. CF. *Whitsey* v. *State*, 796 S.W.2d 707, 720 (Tex.Cr.App. 1989) (opinion on rehearing). Accordingly, we do not find the trial judge's conclusion that no black veniremembers were intentionally excluded on account of their race to be clearly erroneous.

Appellant's first seven points of error are overruled.

II.

Appellant next complains that ten prospective jurors should have been excluded for cause on his motion, mainly because their attitudes about punishment were so harsh that they could not realistically consider the minimum penalty for murder or give fair effect to the presumption of innocence. *See, e.g., Faulder* v. *State*, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987), and *Homan* v. *State*, 662 S.W.2d 372 (Tex.Cr.App. 1984), *respectively*.

The fact that a veniremember holds strictly retributive values or advocates severe punishment for criminal offenders does not disqualify him from jury service in this state. Just as those opposed to capital punishment or inclined to leniency in general are legally qualified jurors, so also are those holding an opposite system of values. Neither kind of person is challengeable for cause unless he harbors a bias or prejudice against the law which is likely to prevent or substantially impair performance of his duties as a juror.

One who regards with disfavor the minimum penalty for a criminal offense is not necessarily suffering an objectionable impairment. *See Williams* v. *State*, 773 S.W.2d 525, 535-537 (Tex. Cr. App. 1988). So long as he is able to give the entire legal range of punishment due consideration, he is a fully capable juror under the laws of Texas. *Cordova v. State*, 733 S.W.2d 175, 164-185 (Tex.Cr.App. 1987). Likewise, those who express the accurate belief that indictees are officially suspected of wrongdoing do not thereby possess a fatal bias against the presumption of innocence unless they are also unwilling to base their conclusions about culpability entirely upon the evidence actually adduced in their presence at trial. *See Mays* v. *State*, 726 S.W.2d 937, 951 (Tex.Cr.App. 1986); *Bell* v. *State*, 724 S.W.2d 780, 797 (Tex.Cr.App. 1986).

We have carefully examined the complete *voir dire* examination of each veniremember whom appellant claims was challengeable for cause, whether for prejudice against the full range of punishment or bias against the presumption of

innocence. As to each respective claim, we find credible assertions of willingness to obey instructions of the court with respect to all matters of law affecting jury deliberations and to consider the full range of punishment applicable to every potential offense in the case. *See Appendix B.* Consequently, appellant has not persuaded us that the trial judge erred by rejecting his challenge to any specified veniremember.

Points of error eight through sixteen, inclusive, are overruled.

III.

In his seventeenth point of error appellant claims that the trial judge erred in refusing to allow him additional peremptory challenges during the jury selection process.

By law, each side in a capital murder prosecution wherein the death penalty is a possible punishment is allowed to decline, without specific legal cause, the service of fifteen prospective jurors. Art. 35.15 (a), V.A.C.C.P. The law does not authorize more peremptory challenges than this except for the selection of alternate jurors. Art. 35.15 (d), V.A.C.C.P. The only other instance in which an additional challenge should be dispensed by the trial judge is where he has erroneously denied an earlier challenge for cause and the aggrieved party was thereby forced to use a peremptory strike against an objectionable juror. *Demouchette* v. *State*, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986); *Thomas* v. *State*, 701 S.W.2d 653, 658 (Tex.Cr.App. 1985). In such case, however, the additional challenge merely restores a full complement of strikes to the offended party.

Because appellant did not demonstrate in Part II, *ante*, that he was forced to expend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to allow him more peremptory challenges was not improper. *Barney* v. *State*, 698 S.W.2d 114, 124 (Tex.Cr.App. 1985); *Von Byrd* v. *State*, 569 S.W.2d 883, 892-893 (Tex.Cr.App. 1978).

Appellant's seventeenth point of error is overruled.

IV.

Points of error eighteen and nineteen pertain to two witnesses called by the defense who refused to testify at trial upon the ground that their testimony might incriminate them. Appellant sought "transactional immunity" for both, and here complains that the trial judge erroneously denied it. Arguing that the State is generally entitled to such immunity for prosecution witnesses under V.T.C.A., Penal Code, Section 71.04, appellant insists that ordinary principles of fairness secure him a like consideration.

But the statute to which he refers applies by its terms only to "an offense under this chapter[,]" meaning an offense under Chapter 71 of the Penal Code. Since appellant was not charged with such an offense in the instant prosecution, it does not appear that Section 71.04 is in control of his demand for witness immunity. In any case, neither the statute, the constitutional right of compulsory process, nor the vital decisional law of this State assures an accused equal license to compel a grant of immunity for purposes of obtaining testimony otherwise subject to the privilege against self-incrimination. *Autry* v. *Estelle*, 706 F.2d 1394, 14001403 (5th Cir. 1983); *United States* v. *Chagra*, 669 F.2d 241, 258261 (5th Cir. 1982); *Moorhouse* v. *State*, 614 S.W.2d 450, 453 n. 3 (Tex.Cr.App. 1981) (Clinton, J., concurring); *Ross* v. *State*, 486 S.W.2d 327, 328-329 (Tex.Cr.App. 1972). *But see Norman* v. *State*, 588 S.W.2d 340, 343-345 (Tex.Cr.App. 1979). Witnesses who possess the privilege are themselves only entitled to testimonial or use immunity under such circumstances. *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Ex parte Wilkinson*, 641 S.W.2d 927, 929-930 (Tex.Cr.App. 1982); *Ex parte Shorthouse*, 640 S.W.2d 924 (Tex.Cr.App. 1982). Accordingly, appellant's demand of transactional immunity for his witnesses need not have been granted by the trial judge.

Points of error eighteen and nineteen are overruled.

V.

Appellant's wife, a coindictee, also invoked her privilege not to testify at trial. However, appellant claims that she

waived the privilege by testifying outside the jury's presence as to her name, age, marital status, and whereabouts on a date pertinent to the instant prosecution. The trial judge agreed and held her in contempt for refusing to testify before the jury, but denied appellant's request to read a transcription of her earlier testimony to the jury instead. Because this transcription would have included statements made to the trial judge tending to create an alibi for appellant, he maintains it was error to exclude the evidence.

We need not decide whether appellant's wife indeed waived her privilege not to testify, as the transcription of her earlier statements was never actually offered in evidence by appellant. *But see Grayson* v. *State*, 684 S.W.2d 691 (Tex.Cr.App. 1984). Although the State shared appellant's view at trial that her privilege had been waived, it evidently did not agree that her remarks to the trial judge should be read to the jury, since no objection was interposed by the prosecutor when the judge denied appellant's motion to do so. It thus seems that the trial judge anticipated an objection from the State and prospectively sustained it.

Ordinarily, we would be disinclined to condone such behavior. Parties are bound to make their own objections, and trial judges are usually expected to receive evidence against which no objection has been interposed. In this instance, however, appellant didn't attempt to offer his evidence in the usual way, as by calling a witness to his wife's declarations. As a consequence, counsel for the State wasn't afforded a fair opportunity to register his own objections, if any. Instead, appellant solicited prospective permission of the trial judge to have his wife's statements read to the jury by the court reporter. But because this testimony was not elicited in the jury's presence to begin with, reading it back before receiving it into evidence would have been improper. In short, appellant was obliged first to offer the evidence before complaining of its exclusion. Likewise, the State was not obliged to interpose an objection to evidence not actually tendered before the tier [sic] of fact. Under the present circumstances, therefore, we think it inappropriate to find er-

ror in the court's ruling. Appellant's twentieth point of error is overruled.

VI.

In four points of error, appellant complains of the receipt into evidence of twenty-three color photographs depicting from various angles and at various distances the murder scene and body of the deceased. He claims that these photographs were offered "solely to inflame the minds of the jury." *Martin* v. *State*, 475 S.W.2d 265, 267 (Tex.Cr.App. 1972). We have since recognized, however, that the admissibility of photographs with inflammatory potential is controlled by Texas Rule of Criminal Evidence 403, and have declared Martin defunct to the extent of any conflict. *Long* v. *State*, 823 S.W.2d 259, 271-272 (Tex.Cr.App. 1991). Still, the result in this case would be the same under either formulation.

We have examined the exhibits in question, and they do not impress us as unusually shocking or gruesome. Because appellant doesn't dispute their relevancy, we are unconvinced that the prejudice inherent in a visual representation of this dreadful crime necessarily outweighs as a matter of law its acknowledged probative value. Tex.R.Crim.E. 403; *Rogers* v. *State*, 774 S.W.2d 247, 258 (Tex.Cr.App. 1989); *Williams* v. *State*, 773 S.W.2d 525, 539 (Tex.Cr.App. 1988). Accordingly, the trial judge was within the ambit of his discretion to admit the photographs.

Appellant's points of error twenty-one through twenty-four, inclusive, are overruled.

VII.

Points twenty-five through thirty-four declare that appellant's arrest and the subsequent search of his automobile were unlawful, that the ordnance seized as a result should have been suppressed, and that color photographs of the car, the weapons, and the scene were likewise inadmissible. *See* U.S. Const., Amend. 4; Tex.Const. Art. 1, Sec. 9.

When investigation of the murder in this case cast suspicion on appellant, a warrant was issued for his arrest and

for a search of his Irving residence. It was then discovered that he had gone to Houston and was residing with an acquaintance there. Accordingly, Dallas authorities advised Harris County by teletype that appellant was wanted on a murder warrant in Irving.

Based on this information, agents of the Houston Police Department (HPD) and of the United States Bureau of Alcohol, Tobacco, and Firearms sought a search warrant for the residence of appellant's Houston acquaintance, including another warrant for appellant's arrest. While the site was surrounded, appellant and his friend arrived in a white Cadillac Seville. After depositing his companion and the latter's young children at the house, appellant noticed approaching law enforcement officers. Evidently in an attempt to escape, he backed from the driveway and spun the car quickly around, but his egress was blocked by a police vehicle. Brandishing a pistol, he sprang from the car, was shot by an HPD marksman and then arrested.

Appellant insists that his arrest was in fact made under authority of the Harris County warrant, which was invalid because issued only after he was actually taken into custody. But we need not pass upon validity of the Harris County warrant as Houston police officers were authorized to arrest appellant pursuant to the Dallas warrant of which they had been informed. The legality of their conduct in reliance on this warrant did not depend, as appellant mistakenly contends, upon their actual possession of the document. Art. 15.26, V.A.C.C.P.; *Bradley* v. *State*, 478 S.W.2d 527, 530 (Tex.Cr.App. 1972); *Cook* v. *State*, 470 S.W.2d 898, 899 (Tex.Cr.App. 1971). Rather, they were fully empowered to arrest him on notice of the outstanding warrant received electronically from Dallas law enforcement authorities. *Cf.* Art. 15.08, V.A.C.C.P. Any weapons and ammunition taken at that time from his person or from places in the immediate vicinity were, of course, seized pursuant to a lawful arrest and not subject to suppression on the grounds he now urges. *New York* v. *Belton*, 453 U.S. 454 (1981).

As for items obtained from within the Cadillac, especially weapons found in the trunk, the record reflects that the car was owned by appellant's companion, who voluntarily consented to its search by law enforcement officers. *See United States* v. *Matlock*, 415 U.S. 164 (1974); *Sharp* v. *State*, 707 S.W.2d 611, 617 (Tex.Cr.App. 1986); *Williams* v. *State*, 621 S.W.2d 609, 613 (Tex. Cr.App. 1981) (panel opinion). *Cf. Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

Points of error twenty-five through thirty-four, inclusive, are overruled.

VIII.

Next, appellant maintains that the court's charge to the jury erroneously failed to restrict consideration of extraneous offenses to the limited purpose for which they were proven.

When evidence is received for a limited purpose the jury should, of course, be instructed as to the limitation, at least upon timely request of an affected party. Tex.R.Crim.E. 105 (a). Most often such limitation is sought because the evidence is relevant, not only to the issue for which it was received, but also to some other issue upon which it was not admissible and concerning which it might therefore be unfairly prejudicial. *See* Tex.R.Crim.E. 403. Proof of an extraneous offense is almost invariably admissible at the guilt/ innocence phase of trial only insofar as it illuminates a material issue in the case, *E.g.*, *Crank* v. *State*, 761 S.W.2d 328, 340-345 (Tex.Cr.App. 1988). It is never admissible merely to encourage the inference that an accused is likely to be guilty solely because he committed other crimes in the past. Tex.R.Crim.E. 404 (b). *E.g.*, *Williams* v. *State*, 662 S.W.2d 344 (Tex.Cr.App. 1983).

In the instant cause the trial judge overruled appellant's objection to the admission of extraneous offenses without requiring the State to indicate the purpose for which it offered the evidence. Whether the judge erred in this respect, either by overruling appellant's objection or by failing to specify the limited purpose for which the evidence was received, is not a question upon which appellant has sought

review in this Court. Rather, he complains only that the court's charge on extraneous offenses failed to limit the jury's consideration of such evidence to the purpose for which it was received.

Since it appears from the record that such evidence was in fact received, whether rightly or wrongly, for general purposes, the jury was thus entitled to consider it upon any issue to which it was relevant, without limitation. Tex.R.Crim.E. 105 (a); *Richardson* v. *State*, 786 S.W.2d 335, 337-338 (Tex.Cr.App. 1990); *Cantrell* v. *State*, 731 S.W.2d 84, 94-95 (Tex.Cr.App. 1987). Accordingly, the trial judge did not err in overruling appellant's objection.

Point of error thirty-five is overruled.

IX.

Finally, appellant asserts that four prospective jurors were excluded for cause on motion of the State because of their opposition to capital punishment, in violation of the United States Constitution. *Wainwright* v. *Witt*, 469 U.S. 412 (1985); *Adrams* v. *Texas*, 448 U.S. 38 (1980); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). An examination of the record discloses that, while not all of these veniremembers were opposed to the death penalty in principle, all were opposed for reasons of conscience or religion to serving as jurors in a case where the death penalty might be assessed.

We have held that capital veniremembers, even if willing and able honestly to answer the special punishment issues, may be challenged for cause if they would opt to refuse the oath of a juror and thereby disqualify themselves from jury service on account of personal aversion to assessing the death penalty. *Goodwin* v. *State*, 799 S.W.2d 719, 733-734 (Tex.Cr.App. 1990); *Ellis* v. *State*, 726 S.W.2d 39, 41-44 (Tex.Cr.App. 1986). *Cf. Felder* v. *State*, 758 S.W.2d 760, 765-766 (Tex.Cr.App. 1988). *Contra Hernandez* , 757 S.W.2d at 753. The record in this cause rather clearly reflects that each of the prospective jurors whose exclusion is at issue here chose to exercise that option.

Appellant's thirty-sixth point of error is, therefore, overruled.

Finding no reversible error in the complaints assigned for review, we affirm appellant's conviction and sentence of death.

PER CURIAM

EN BANC

DELIVERED: September 16, 1992

DO NOT PUBLISH

Overstreet, J., concurs in the result Clinton, J., dissents

Baird and Maloney, JJ, not participating

APPENDIX A

POINTS OF ERROR ONE THROUGH SEVEN:

Boseman: Venireman #7

State's justification for peremptory strike included the venireman's testimony regarding the death penalty and his possible hesitation in giving such a sentence. Support is found in the record where Boseman testified he agreed with the death penalty but could not serve on a capital murder jury (Voir Dire Vol. I-282). Also, he testified that if he felt that the defendant should not be executed, he could not answer the three punishment issues yes even though the evidence supported affirmative answers (Voir Dire Vol. I-300 through 301).

Fields: Venireman #9

State's justification for peremptory strike included the venireman's testimony regarding rehabilitation, religious beliefs, and the fact his brother had been convicted of a felony. Support is found in the record where Fields testified that the death penalty was only appropriate when a person could not be rehabilitated and it was his belief that anyone could be rehabilitated who found God (Voir Dire Vol. I-423). Also, Fields testified his religion's doctrinal views opposed the death penalty though this was not his personal opinion (Voir Dire Vol. I-404 through 405).

Warren: Venireman #28

Justification for the peremptory strike included Warren's misgivings about the death penalty (Supp. Hearing Vol. I-29 through 31). The record indicates that Warren had mixed feelings about the death penalty serving a purpose (Voir Dire Vol. III-1532). In addition, he did not agree with the death penalty in all cases (Voir Dire Vol. III-1526). The state also noted that the strike of Mr. Warren came at a time when they had numerous peremptory strikes remaining and could utilize them with less caution.

Rand: Venireman #37

State's justification for peremptory strike included Rand's "today I say I can, but tomorrow I might not" (Voir Dire Vol. IV-2008).

Boggess: Venireman #40

State's justification for peremptory strike includes Boggess' reluctance to sit on a capital murder jury (reflected in record at Voir Dire Vol. IV-2008) as well as the fact she had been a defense witness for her nephew at one time.

Kennedy: Venireman 43

State's justification for peremptory strike included Kennedy's belief that in a capital murder case involving a normal robbery, the death penalty was inappropriate and that it is only appropriate in mass murder situations (Voir Dire Vol. 2176 through 2178).

Baker: Venireman 71

State's justification for peremptory strike involved Baker's dislike for the death penalty and her inability to sentence another human to death (Voir Dire Vol. VIII-2990 through 2991). The State also noted that her antagonistic attitude towards the prosecuting attorney was a factor.

APPENDIX B

POINTS OF ERROR EIGHT THROUGH SIXTEEN:

Weigant: Venireman #6

Defense objected to Weigant's views regarding the death penalty. Weigant testified that his personal view was the death penalty should be used for any intentional murder. However, he specifically stated he would follow the law and would not impose his personal view upon the defendant (Voir Dire Vol. I-204 through 205). Defense also questioned whether he was capable of assessing the minimum punishment for murder. In this regard, he specifically stated he would vote for the five year minimum if the facts of the case warranted it (Voir Dire Vol. I-247 through 249).

Jenkins: Venireman 21

Defense objected to Jenkins' inability to assess the minimum penalty in a murder case. However, Jenkins specifically stated that if the evidence proved that the minimum sentence was warranted, she would give that sentence (Voir Dire Vol. III-1126).

Smale: Venireman #24

Defense objected due to Smale's inability to give the minimum sentence for murder as well as her view that she would be unable to answer any of the three punishment related questions in the negative if the defendant were found guilty of capital murder. However, during questioning by the court, she specifically stated that she would assess the minimum penalty for murder if the evidence showed that it was appropriate (Voir Dire Vol. III-1324 through 2326). She also specifically stated that she could answer one or more of the punishment questions in the negative based upon the evidence and they were not automatic "yes" votes (Voir Dire Vol. III-1336 through 1337).

Nix: Venireman #48

Defense objected due to Nix's inability to consider the minimum punishment for murder. However, she specifically stated that she would assess punishment at five years if she

thought that it was appropriate based upon the evidence presented (Voir Dire Vol. V-2396).

Walters: Venireman X79

Defense objected due to Walters' belief that she would automatically answer yes to all three punishment questions if the defendant was found guilty of capital murder. However, under questioning from the court, Walters testified that the state would have to prove that the answers to the questions were yes; if they were not proven, then she would answer in the negative (Voir Dire Vol. VIII-3393 through 3394).

Davis: Venireman #82

Defense objected to Davis' inability to assess the minimum punishment for murder. However, Davis did specifically say she could vote for the minimum penalty of five years if the evidence warranted such a sentence though she had trouble imagining such a situation (Voir Dire Vol. IX-3496 through 3497).

Spence: Venireman #85

Defense objected to Spence because he presumed the defendant had done something wrong by virtue of his being tried for capital murder. In this regard, Spence testified that an indictment did not satisfy him beyond a reasonable doubt and that he would not consider the indictment as evidence against the defendant (Voir Dire Vol IX-3567 through 3570). Defense also questioned Spence's ability to assess the minimum penalty for murder. Spence, however, specifically stated he would keep an open mind about punishment and would assess the minimum punishment if warranted (Voir Dire Vol. IX-3534 through 3535).

Jones: Venireman #103

Defense objected to Jones' inability to consider the minimum punishment for murder. Jones did testify that he believed the punishment for any murder should be mandatory death and that this would make it easier for him to assess the maximum rather than the minimum penalty. However, he specifically stated he would put these personal

views behind him and would consider the minimum penalty if the evidence supported it. (Voir Dire Vol. XI-4217 through 4220).

O'Dell: Venireman #107

Defense objected to O'Dell due to his inability to consider the minimum penalty for murder. However, he specifically stated he could consider a punishment of five years for murder in the proper case and proper circumstances (Voir Dire Vol. XI-4511 through 4512).

Hearne: Venireman #108

Defense objected *to* Hearne's bias towards police officers, her bias against psychiatrists, and her testimony that she would change her opinion of guilt or innocence if she were the only dissenting vote on the jury. However, she testified she would not give more credibility to a police officer than any other witness (Voir Dire Vol. XI-4622). She also testified her objection to psychiatrists was only in her belief that there were certain things which could not be proven. She specifically stated she would believe a psychiatrist was telling the truth to the best of his ability (Voir Dire Vol. XI-4627 through 4628). Finally, when questioned by the court, Hearne testified she would change her opinion only if convinced by the other jurors that her initial position was incorrect (Voir Dire Vol. XI-4636).

* * * *

No. 69,677

THOMAS JOE MILLER-EL,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM DALLAS COUNTY

AFFIRMED.

OPINION BY
PER CURIAM

Judge

EN BANC
DO NOT PUBLISH
Overstreet, J., concurs in the result
Clinton, J., dissents
Baird and Maloney JJ, not participating

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3-96-cv-1992-H

THOMAS JOE MILLER-EL

Petitioner,

vs.

GARY JOHNSON, Director Texas Department of Criminal Justice, Institutional Division

Respondent.

FINDINGS AND RECOMMENDATION OF THE UNTIED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and an order of reference from the district court. The findings and recommendation of the magistrate judge are as follow:

I.

PROCEDURAL BACKGROUND

Petitioner Thomas Joe Miller-El was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *Miller-El* v. *State*, No. 69,677 (Tex. Crim. App. September 16, 1992), *cert. denied*, 114 S. Ct. 100 (1993). Petitioner also filed an application for writ of habeas corpus in state court. The trial judge made written findings and recommended that the application be denied. The Texas Court of Criminal Appeals denied habeas relief in an unpublished opinion. *Ex parte Miller-El*, No. 31,001 (Tex. Crim. App. June 17, 1996). Petitioner then filed this action in federal court.

II

ISSUES PRESENTED

Petitioner raises four issues in six grounds for relief. He contends that: (1) the prosecution exercised its peremptory challenges in a racially discriminatory manner; (2) a prospective juror was improperly struck for cause; (3) the trial court failed to conduct a competency hearing and allowed the trial to proceed despite the fact that he was incompetent; and (4) the prosecutor improperly referred to his religious affiliation during sentencing.

III.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Pub.L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA establishes specific standards and procedures for reviewing death penalty habeas cases. *See* 28 U.S.C. §§ 2661-2266. These rules apply to all capital cases pending on or after the effective date of the AEDPA, provided the state has established a mechanism for the "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings." *Id.* § 2261(a), (b) & (c). Texas does not yet meet these "opt-in" requirements. *Carter* v. *Johnson*, 110 F.3d 1098, 1104 (5th Cir.), *vacated on other grounds*, 118 S.Ct. 409 (1997). Therefore, the Court must look to the general standards of review under the AEDPA.

A federal court may not grant habeas relief with respect to any claim that was adjudicated on the merits in a state court proceeding unless petitioner shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A state court decision is not "contrary to clearly established

federal law" unless a different result was dictated by existing Supreme Court precedent. *Drinkard* v. *Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1114 (1997). A state fact finding is not "unreasonable" unless the petitioner can rebut the finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). An application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 769.[1]

[1] Petitioner argues that *Drinkard* misinterpreted the standard of review for federal habeas cases under 28 U.S.C. § 2254(d)(1). The *Drinkand* court held that the first clause of the statute-prohibiting habeas relief unless the state court adjudication resulted in a decision that was "contrary to" clearly established federal law—applies only to questions of pure law. Under this interpretation, a federal court cannot grant habeas relief unless the state court failed to identify the correct rule of law when it adjudicated the claim. *Drinkard*, 97 F.3d at 767-68. Petitioner advocates a different interpretation of the "contrary to" clause. He suggests that the proper inquiry should be whether the Supreme Court had announced a controlling rule of law prior to the time the claim was adjudicated in state court. If so, a federal habeas court must decide whether the state court decision is "contrary to" that established law. Otherwise, the "unreasonable application" clause of the statute comes into play and the federal court must determine whether the state court adjudication was untenable under existing Supreme Court authority. (Pet. Reply at 13-17).

In sum, petitioner maintains that there is no basis for the distinction in the standard of review for "pure legal questions" and "mixed questions of law and fact" under the AEDPA. Both should be subject to review under the "unreasonable application" clause of section 2254(d)(1) where there is no Supreme Court authority directly on point. *(Id.). See Drinkard*, 97 F.3d at 778-79 (E. Garza, J., dissenting). Moreover, petitioner contends that the court's interpretation of the "unreasonable application" clause—making habeas relief available "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists"—raises serious problems under Article III and the Suspension Clause of the U.S. Constitution. (Pet. Reply at 20). These are thoughtful and provocative arguments. Nevertheless, this Court is bound by the *Drinkard* majority and must follow its holding. *See Cedillo* v. *Valcar Enterprises & Darling Delaware Co.*, 773 F.Supp. 932, 936 (N.D. Tex. 1991) (district court is bound by Fifth Circuit precedent).

IV.

PEREMPTORY CHALLENGES

(Grounds 1 & 2)

In two related grounds for relief, petitioner argues that the prosecution used 10 of its 14 peremptory challenges to exclude African-Americans from jury service in violation of the equal protection clause of the Fourteenth Amendment.

A. *Applicable Law*

The Fourteenth Amendment guarantees every defendant in a criminal case equal protection under the law. *Hernandez.* v. *State*, 347 U.S. 475, 477, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). This right extends to the jury selection process. *Swain* v. *Alabama*, 380 U.S. 202, 204, 85 S .Ct. 824, 826,13 L.Ed.2d 759 (1965); *Strauder* v. *West Virginia*, 10 Otto 303,100 U.S. 303, 305-08, 25 L.Ed. 664 (1879). Thus, a prosecutor may not use his allotted peremptory challenges to exclude potential jurors solely on the basis of their race. *Swain*, 85 S.Ct. at 837-38. Prior to the *Batson* decision in 1986, the use of peremptory strikes against minorities in any single case was not unconstitutional. *Id.* at 836-37. Rather, a defendant was required to demonstrate a historical pattern of racial bias in the selection of juries. *Id.* at 837-38. The Fifth Circuit explained this burden as follows:

> In order to prevail [on a *Swain* claim], [petitioner] must prove that his prosecutor "had a systematic and *intentional* practic of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated through petitioner's trial."

Evans v. *Cabana*, 821 F.2d 1065, 1068 (5th Cir.), *cert. denied*, 108 S.Ct. 5 (1987), quoting *Willis* v. *Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 3548 (1984) (emphasis in original). Absent evidence of purposeful and systematic discrimination, the prosecutor was entitled to a presumption that he used his peremptory stakes in a proper manner. *Swain*, 85 S.Ct. at 837.

The Supreme Court revisited this issue twenty years later in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Recognizing that it was often impossible for a defendant to prove the systematic exclusion of minorities from jury service over an extended period of time, the Court rejected this evidentiary formulation "as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.*, 106 S.Ct. at 1721.[2] No longer were defendants required to establish a historical pattern of discrimination in the use of peremptory stakes. *Batson* held that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case." *Id.* at 1722 (emphasis in original).

A proper *Batson* challenge has three elements. First, the defendant must raise an inference that the prosecutor excluded potential jurors solely on the basis of race. *Id.* at 1723; *United States* v. *Wallace*, 32 F.3d 921, 925 (5th Cir.1994). A defendant may satisfy this burden in a variety of ways, such as showing a pattern of strikes against minority jurors on the venire panel or statements made by the prosecutor during the voir dire examination. *Batson*, 106 S.Ct. at 1723. Once the defendant makes a *prima facie* case, the burden shifts to the prosecution to articulate a race-neutral explanation for each of the challenged strikes. *Id.* at 1723-24; *Wallace*, 32 F.3d at 925. This inquiry focuses on the facial validity of the proffered explanation. "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral."

[2] The Supreme Court observed that the "crippling burden" imposed by Swain rendered the prosecution's use of peremptory challenges "largely immune from constitutional scrutiny." *Batson*, 106 S.Ct. at 1721. Indeed, this Court has found only two reported cases in which *Swain* relief was granted. *See State* v. *Washington*, 375 So.2d 1162 (La. 1979); *State* v. *Brown*, 371 So.2d 751(La. 1979). Both cases involved the same prosecutor who essentially admitted that he systematically struck African-Americans from jury service. *Washington*, 375 So.2d at 1163-64.

Purkett v. *Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (citations omitted); see also United States . Perkins, 105 F.3d 976, 978 (5th Cir. 1997). The trial court then determines whether the defendant has proven purposeful discrimination. *Batson*, 106 S.Ct. at 1724; *Wallace*, 32 F.3d at 925.

When the record contains an explanation for the prosecutor's use of peremptory challenges, the reviewing court need only decide the propriety of the ultimate finding of discrimination. *Perkins*, 105 F.3d at 978; *United States* v. *Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). This finding is entitled to great deference because it largely turns on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Hernandez* v. *New York*, 500 U.S. 352, 363, 111 S.Ct.1859,1869,114 L.Ed.2d 395 (1991); *United States* v. *Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). In a federal habeas case, such a finding will not be disturbed "unless it constitutes an unreasonable determination of the facts in light of the evidence presented in the prior state court proceeding." 28 U.S.C. § 2254(d)(2); *see also Carter*, 110 F.3d at 1104.

B. *State Court Proceeding*

Petitioner, an African-American, was charged with intentionally causing the death of a hotel clerk during the course of a robbery. The state sought the death penalty. Jury selection began on February 3, 1986 and continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including 18 African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause.[3] Both sides were then allowed 15 peremptory challenges. The prosecution used 10 strikes against African-Americans. The defense ex-

[3] The record shows that petitioner agreed to excuse Hilbert Gitchaway, Dora Randle, Vergie Miller, Jerry W. Moseley, Lourice Collier, and Johnnie Holma. (Pet. Supp. Brief, App. 1 at 60). Virginia Smith was struck for cause because of her views on the death penalty. (SF Voir Dire-II 1006).

ercised all 15 of its challenges against non-minorities. One African-American was seated on the jury.[4]

On March 9, 1986—just four days after the jury was empanelled—the *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. *See Steve McGonigle & Ed Timms, Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at Al. (Am. Petition, Exh. 3). The newspaper article examined the racial and ethnic composition of juries in 100 randomly selected felony trials between 1983 and 1984. Of 467 African-American jurors qualified to serve in those cases, 405 were peremptorily challenged by the state. The study found that African-Americans were five-times more likely to be removed from a jury panel than whites, and twice as likely to be struck as Hispanics. Indeed, 70 of the 100 trials studied during the relevant time period had no African-Americana jurors at all.[5]

This article prompted defense counsel to file a motion to quash the jury panel. The motion was heard on March 12,

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[4] The only African-American not challenged by the prosecution, Troy L. Woods, was the quintessential state's juror. When asked about his feelings on capital punishment, Woods stated:

> It's too quick. They don't feel the pain . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

(SF Voir Dire-X 3848).

[5] The same authors also studied 15 capital murder trials in Dallas County between 1980 and 1986. *See Ed Timms & Steve McGonigle, A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1. (Am. Petition, Exh.10). Of 62 African-Americans qualified to serve as jurors in those cases, 56 were struck by the state with peremptory challenges. Only five African Americans served on capital murder juries during this time period. While five of the 15 cases involved African-American defendants, four of those defendants were tried by all-white juries. Ironically, petitioner was the only African-American defendant to have a trial before at least one member of his own race.

1986. At the hearing, petitioner attempted to show that the Dallas County District Attorney's office had an "unofficial policy" of excluding African-Americans from jury service. This policy dated back to the late 1950s, but was still being followed by some prosecutors at the time of petitioner's trial. Five current or former judges, two prosecutors, and two defense lawyers testified at the hearing.[6] One witness, former Assistant District Attorney Jon Sparling, testified about a memo he wrote in 1969 on jury selection in criminal cases. (SF-3/12/86 Hrg. 27-57 & Def. Exh. 1). This 19-page document is punctuated with racial, ethnic, religious, and gender-based stereotypes. For example, Sparling advises prosecutors that "[who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the [d]efendant . . ." (*Id.*, Def. Exh. 1 at 301) (emphasis added). He goes on to state that "[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant. (*Id.*, Def. Exh. I at 303, 305).

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[6] Among the witnesses to testify at the hearing was Jack Hampton, presiding judge of the 283rd Judicial District Court. Judge Hampton served as an Assistant District Attorney in the late 1950s. He recalled being reprimanded by District Attorney Henry Wade after allowing an African-American woman to serve on a jury in a DWI case. (SF-3/121/86 Hrg. 59-60). Significantly, Wade still served as Dallas County District Attorney when petitioner was tried in March 1986.

Other witnesses testified about more recent incidents of purposeful discrimination against African-American jurors. Harold Entz, presiding judge of Dallas County Criminal Court No. 4, said that one of his prosecutors wanted to shuffle a jury panel "because a predominant number of the first, six, eight, or ten jurors were blacks." (*Id.* at 104). This occurred within the past "three or four years." (*Id.* at 103). Another judge, Ed Kinkeade, testified that he thought prosecutors had systematically excluded African-Americans from juries in his court. (*Id.* at 112-13). This observation was confirmed by Judge Larry Baraka, who barred a prosecutor from conducting voir dire in his court after an incident in 1985. (*Id.* at 74-75, 77). Judge Baraka admitted that there had been "a systematic exclusion of blacks by the State from juries" in the past. However, he thought "things had improved considerably" since about 1980, (*Id.* at 75-76).

Sparling testified that his memo was used to train misdemeanor prosecutors and became part of a manual distributed to all members of the Dallas County District Attorney's office. (*Id.* at 2930).

At the conclusion of the hearing, the trial judge found that there was "no evidence presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (*Id.* at 146). He therefore concluded that petitioner failed to establish a *Swain* violation. (*Id.*). The case proceeded to trial and petitioner was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided *Batson*.

On direct appeal, petitioner challenged the jury selection process under the more liberal Batson standard.[7] The Texas Court of Criminal Appeals found that petitioner had established an inference of purposeful discrimination because the prosecutor used "such a skewed number of strikes on the black veniremen" and "only a single black juror was seated on the panel." *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). However, the prosecutor was never given an opportunity to explain his use of peremptory challenges. The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

This hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the 14 African-Americans from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination.[8] Specifically, the court found that: (1)

[7] The Supreme Court has held that *Batson* applies retroactively to cases pending on direct review at the time it was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). Consequently petitioner was able to raise this claim for the first time on appeal.

[8] The trial court also found that petitioner failed to raise an inference of purposeful discrimination through the state's use of peremptory challenges. (Supp. Tr. at 4). However, this finding appears to be contrary to the decision of the Texas Court of Criminal Appeals. *See* Miller-El, 748 S.W.2d at 460 ("We find that appellant has established an inference as required by the *Batson* court.")

none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case. (Supp. Tr. at 6-7). Petitioner challenged these findings on direct appeal. However, the Texas Court of Criminal Appeals found that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No. 69,677, op. at 2 (Tex. Crim. App. September 6, 1992).

C. *Swain Claim*

Petitioner seeks federal habeas relief under both *Swain* and *Batson*. He argues that these cases have distinct applications and provide independent grounds for challenging discriminatory a jury selection practices. Petitioner urges this dichotomy so he can't take advantage of dicta in *Swain* analogizing a Fourteenth Amendment equal protection case to a Sixth Amendment fair cross-section claim once a *prima facie* showing of systematic discrimination has been made.[9] Since such evidence was presented in this case, petitioner maintains that he is entitled to an inference that the prosecutor used his peremptory challenges in a racially discriminatory manner.

This argument fails for several reasons. First, petitioner misreads *Swain*. While recognizing that "[t]otal exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part," the Supreme Court held that

[9] The Sixth Amendment guarantees a defendant the right to trial by an impartial jury "drawn from a fair cross-section of the *community*." *Taylor* v. *Louisiana*, 419 U.S. 522, 536, 95 S.Ct. 692, 700, 42 L.Ed.2d 690 (1975).

"this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service." *Swain*, 85 S.Ct. at 839. The Court went on to explain:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State.

Id. Thus, *Swain* rejected any analogy to fair cross-section cases without proof that the prosecutor systematically. Used peremptory strikes against minorities over a period of time. *Id.* at 839-40. Historical evidence, standing alone, was never enough to prove a *Swain* violation.

Nor is there any authority for the proposition that Swain somehow survives *Batson*. In fact, *Batson* specifically overruled *Swain*. *Batson*, 106 S.Ct. at 1725 n.25 ("To the extent that anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled."). Moreover, the two cases are wholly complementary with regard to their treatment of historical evidence. Under *Swain*, a defendant was required to prove systematic discrimination as a prerequisite to an equal protection claim. *Swain*, 85 S.Ct. at 837-38. This requirement was abolished in *Batson*. *Batson*, 106 S.Ct. at 1722. However, historical evidence can still be used to establish a *prima facie* case of discrimination in the jury selection process. *Id.* at 1721-22. A defendant may show that the prosecutor in his case had a practice of striking minority jurors over a period of time. It then becomes incumbent upon the prosecutor to explain his use of peremptory challenges in light of that fact. Regardless of the type of evidence presented, the standard of proof remains the same. It makes no difference whether the defendant's prima facie case is based on historical evidence or the actions of the prosecutor at trial. The court must consider the "totality of relevant facts in determining whether purposeful discrimination exists in any particular case."

Finally, the Supreme Court has held that a defendant may not challenge the composition of a petit jury on the grounds that it does not represent a fair cross-section of the community. *Holland v. Illinois*, 493 U.S. 474, 487,110 S.Ct. 803, 811, 107 L.Ed.2d 905 (1990). Rather, such a claim applies only to the venire from which the jury is ultimately selected. *Id.*, 110 S.Ct. at 807. It therefore follows that the standards governing a fair cross-section claim under the Sixth Amendment are not applicable to an equal protection claim under the Fourteenth Amendment. *Cf. id.* at 806 (rejecting invitation to extend *Batson* standards to Sixth Amendment fair cross-section claims).

The Court concludes that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges in this case. Petitioner's equal protection claim must be analyzed under the standard of proof articulated in *Batson*.

D. *Batson Claim*

Petitioner characterizes the evidence supporting his equal protection claim as "copious and multifaceted." (Am. Petition at 15). This is an understatement. His amended petition contains 202 pages of argument on this point, with citations to numerous state and federal authorities. Succinctly stated, petitioner contends that the jury selection practices employed by the state in his case were unconstitutional because: (1) the prosecutors had a documented history of using peremptory challenges against minorities in other cases; (2) African-American jurors were subjected to disparate questioning on the issue of minimum punishment; and (3) the state accepted non-minority jurors with the same characteristics as African-Americans who were struck by the prosecution. A brief discussion of these arguments, none

of which were presented to the state court, is necessary to the disposition of this claim.[10]

1. *Other Cases*

Petitioner maintains that two of the prosecutors in his case, Paul Macaluso and Jim Nelson, "had a history of discriminating against African Americans in jury selection and that this practice continued at his trial." (Am. Petition at 59). As proof of discriminatory intent, he cites two other cases involving the same prosecutors. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2602 (1990); *Dorothy Jean Miller-El v. State*, 790 S.W.2d 351 (Tex. App.-Dallas 1990, pet. ref'd).[11] Both cases were reversed for *Batson* violations. Even assuming that this evidence constitutes a pattern of systematic discrimination, it is only relevant in determining whether petitioner has established a *prima facie* case under *Batson*. The state court already found that petitioner has met this burden. *Miller-El*, 748 S.W.2d at 460. Consequently, the focus shifts to the explanation proffered by the prosecution for its use of peremptory challenges. Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination in this case.

2. *Improper Questioning*

Petitioner also contends that all African-American jurors were subjected to disparate questioning on the issue of minimum punishment. He points out that non-minority "pro-death penalty" jurors were fully informed of the range

[10] The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. See ORDER, 7/28/99. Respondent conceded that these arguments "are subsumed within the broad *Batson* issue and are not tantamount to the presentation of a new claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

[11] Dorothy Jean Miller-El is petitioner's wife. She was convicted of murder and attempted capital murder in a separate trial.

of punishment for murder and asked whether they could keep an open mind on the subject. However, the prosecutor posed the same question to non-minority "anti-death penalty" jurors and—all African-American jurors in an open-ended manner. These jurors were asked, "What do you personally feel ought to be the minimum punishment for somebody committing a murder?" (SF Voir Dire-I 307-17). Most of the jurors responded with sentences well in excess of the statutory minimum of five years. When the prosecutor informed the jurors of the actual range of punishment, many felt that the minimum sentence was too lenient. As a result, they effectively disqualified themselves from serving on the jury.[12]

Obviously, petitioner intends to show that the prosecutors were of a mind to discriminate. However, no African-American jurors were peremptorily challenged because of their views on minimum punishment. Nor were any African-Americans struck for cause on that basis. Once again, the relevant inquiry in this case is whether the race-neutral explanations proffered by the state for its use of peremptory challenges were pre-textual. If those reasons withstand scrutiny, there is no equal protection violation. Any evidence about the prosecutor's motivation for asking a question that did not form the basis of a peremptory challenge is simply irrelevant.

3. *Comparative Juror Analysis*

The prosecutor explained that he struck nine African-American jurors because of their attitude toward the death penalty or their reluctance to serve on a death penalty

[12] Texas law allows the prosecution to challenge a prospective juror who demonstrates "bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." TEX. CODE CRN. PROC. ANN. art. 35.16(b)(3) (Vernon 1989). Thus, the state may strike a juror who cannot agree to consider the minimum punishment. *Phillips v. State*, 701 S.W.2d 875, 884 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 3285 (1986).

jury.[13] Another African-American was struck because of her views on rehabilitation. Petitioner contends that these explanations were pretextual because non-minorities with the same or similar characteristics were accepted by the state. Consideration of this argument requires a careful review of the voir dire examination of each challenged juror.

a. *Juror Bozeman*

Roderick Bozeman was the seventh juror on the venire panel and the first African-American questioned. Bozeman said that he believed in capital punishment, but might have a problem sitting on a death penalty jury. (*Id.* at 282). When asked to explain his answer, Bozeman stated:

> It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

(*Id.* at 284). The prosecutor then inquired whether Bozeman could answer the special issues on punishment based solely on the evidence presented at trial, "knowing full well that [it might] result in the execution of somebody who you personally don't desire to be executed." (*Id.* at 301).[14] Bozeman responded:

[13] Petitioner admits that four African-American jurors—Linda C. Baker, Anna L. Keeton, Paul Bailey, and Janice Mackey—were properly challenged because of their extreme reluctance to serve on a death penalty jury. (Am. Petition at 135 n.52).

[14] Three special issues are submitted to the jury at the conclusion of the punishment phase of a capital murder trial. These questions are:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

> I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

(*Id.*). A short time later, Bozeman changed his answer. He said, "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." (*Id.* at 306). The prosecutor struck Bozeman based on his "feelings on the death penalty" and his "obvious hesitation." (*Id.* at 323).

Petitioner contends that these reasons were pretextual because five non-minority jurors accepted by the prosecution also had misgivings about the death penalty or their ability to serve on the jury.[15] However, such a subjective consideration is not easily assessed from a cold record. *See United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir.1990) ("The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared . . . and often require an evaluation of the degree to which the prospective juror manifests the stated attribute.").

Disparate treatment cannot automatically be imputed in every situation where the state rejects one juror with the same characteristics as another juror who is accepted. Indeed, the decision to strike a particular juror "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir.) *cert. denied*, 118

> (3) Whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(Vernon 1981). An affirmative finding on all three issues by a unanimous jury results in a death sentence. *Id.* art. 37.071(e).

[15] These jurors are identified as Noad O. Vickery, Ronald Salsini, Marie H. Mazza, Gwendolyn Smale, and Joan Weiner. Ironically, petitioner struck Vickery, Salsini, and Smale. (Pet. Supp. Brief, App. 1 at 0059).

S.Ct. 102 (1997) (both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

The record does not reflect the demeanor of Bozeman or the non-minority jurors who expressed doubts or hesitancy about the death penalty. The tone of voice, facial expressions, and other physical qualities of these juror all bear on the assessment of whether their hesitation was merely passing or more deeply-rooted. The trial judge personally observed the proceedings and accepted the prosecutor's explanation for striking Bozeman. The Court must defer to that credibility determination. *Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

Nor is the fact that Bozeman later affirmed his ability to assess the death penalty necessarily dispositive. The use of peremptory challenges is often influenced by intuitive assumptions. *Lance*, 853 F.2d at 1181. The prosecutor is certainly allowed to conclude that a juror's initial indecision may not bode well for the state. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir.1998), *cert. denied*, 119 S.Ct.1152 (1999) ("[T]he prosecutor "had no obligation either to ignore [the juror's comments about her reluctance] or to accept at face value [the juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.") (citation omitted). Such "gut reactions" are the essence of a peremptory challenge.

b. *Juror. Fields*

Billy Jean Fields was the second African-American juror struck by the state. A considerable portion of his voir dire examination focused on the special issue concerning future dangerousness. The prosecutor asked, "What sort of evidence do think would aid you . . . in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?" (SF Voir Dire-I 419). Fields responded that he would want information about the defendant's background. (*Id.* at 420, 422). The following colloquy then occurred:

Q: [BY PROSECUTOR]. Let me just ask you briefly: What does that word probability mean to you in that connotation?

A: [BY JUROR]: Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.

Q: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A: No.

Q: You think everyone can be rehabilitated?

A: Yes.

Q: I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

A: Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation . . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated. F.2d at 1181.[16]

C. *Juror Warren*

The state used its sixth peremptory challenge against Joe Warren, another African-American member of the ve-

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[16] Petitioner argues that the other reason given by the prosecutor for striking Fields—that his brother had been convicted of a felony--was also pretextual. (SF Voir Dire-I 455). The Court need not address this argument in light of upholding the validity of the prosecutor's first explanation.

nire panel. When asked by the prosecutor whether he felt the death penalty accomplished a particular purpose, Warren responded:

> Yes and No. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.
>
> * * * *
>
> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

(SF Voir Dire-III 1532). At the *Batson* hearing, the prosecutor cited this answer as one of the reasons for striking *Warren*. (SF-5/10/88 Hrg. 31). He went on to explain that "at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a peremptory challenge. We did not think he would be a favorable juror for the State." (*Id.* at 32).

Petitioner points out that two non-minorities who had mixed feelings about the death penalty were not struck by the prosecution.[17] However, these jurors were not similarly situated to Warren. After stating that life imprisonment might be a fate worse than death, both non-minority jurors firmly asserted their belief that capital punishment was a deterrent to crime. (SF Voir Dire-III 3264-65; Voir Dire-VIII 1074-75). By contrast, Warren suggested that the death penalty might not serve any purpose. (*Id.* Voir Dire-III 1532). Clearly, his feelings on the subject were more ambivalent than the non-minority jurors accepted by the state. This indecision, coupled with the fact that the state still had nine peremptory strikes remaining, adequately

[17] These jurors are identified as Sandra Jenkins and Kevin Duke.

supports the prosecutor's race-neutral explanation for challenging Warren.

d. *Jurors Kennedy, Rand & Boggess*

Three other African-American jurors—Wayman Kennedy, Edwin Rand, and Carrol S. Boggess-were struck by the prosecution because of their answers to certain questions about the death penalty. There is ample support in the record to support the exercise of these peremptory challenges.

All three jurors voiced concerns about sitting on a death penalty jury or imposing capital punishment in this type of case. Kennedy testified that the death penalty was only appropriate in "extreme cases . . . like a mass murder," and that a life sentence was sufficient for murder occurring during a robbery. (*Id.* Voir Dire-V 2176, 2178). He repeatedly refused to take a firm position on his ability to assess the death penalty until he heard the evidence. (*Id.* at 2182-94). Rand acknowledged that he had doubts about his ability to participate in assessing the death penalty. At first, he told the prosecutor that "somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." (*Id.* Voir Dire-IV 1805-06). Later, Rand said that he could impose a death sentence if warranted by the evidence. (*Id.* at 1809-11). Boggess was even more direct. Although she would serve on the jury if selected, Boggess said that "I wouldn't want to serve and I wouldn't want to have that responsibility to do that . . ." (*Id.* at 2008).

Petitioner argues that the views expressed by these African-American jurors were similar to those of non-minorities who were accepted by the state. However, the record does not support this assertion. None of the non-minority jurors identified by petitioner ever said that the death penalty was not appropriate for a murder committed during the course of a robbery or that they did not want to serve on the jury. Moreover, some of the African-American jurors were struck because of their reluctance or hesitancy in answering questions about the death penalty. These sub-

jective qualities are best judged by the trial court. *See Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

4. *Conclusion*

Petitioner has adduced a considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. There is no other explanation for the appalling statistics brought to light by the *Dallas Morning News* in March 1986. Several judges and defense lawyers confirmed that prosecutors often used peremptory challenges against African-Americans and other minorities for no apparent reason other than race. Then there is the "Sparling Memo"--the article on jury selection that taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity, and gender. Although this evidence is disturbing, it is not dispositive of petitioner's *Batson* claim.

In order to prove an equal protection violation, petitioner must show that the prosecutor used peremptory challenges to purposefully exclude African-Americans from the jury in his case. The historical evidence cited by petitioner helps him establish a *prima facie* case of discrimination. However, he also must demonstrate that the race-neutral explanations offered by the prosecution were merely pretextual. This heavy burden is heightened by the onerous standard of review in federal habeas cases. Here, the trial court found that "the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case" and negated any inference of discrimination. (Supp. Tr. at 6-7). The record supports this determination. Consequently, the finding is not "unreasonable."

See 28 U.S.C. § 2254(d); *Drinkard*, 97 F.3d at 769. This ground for relief is without merit and should be overruled.[18]

V.

CHALLENGE FOR CAUSE

(Ground 5)

Next, petitioner contends that the trial court improperly excused a prospective juror for cause based on her reluctance to impose the death penalty.

A. *Applicable Law*

The Sixth Amendment to the United States Constitution guarantees a defendant the right to trial by an impartial jury. U.S. CONST. amd. VI. This prevents the imposition of punishment in a capital case by a jury organized to guarantee a death sentence. *Witherspoon* v. *Illinois*, 391 U.S. 510, 521-22, 88 S.Ct.1770,1776-77, 20 L.Ed.2d 776 (1968). Still, a potential juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright* v. *Witt*, 469 U.S. 412, 424,105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45,100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). Juror bias need not be proved by "unmistakable clarity." *Witt*, 105 S.Ct. at 852. Rather, the trial judge has discretion to determine whether a prospective juror can faithfully and impartially apply the law. *Id.* at 852-53. This determination is entitled to a presumption of correctness and should be reversed only in a "clear case." *Id.* at 854 n.9, *quoting Reynolds v. United States*, 8 Otto 145, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1879).

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[18]/ The Court also notes that an African-American served on the jury. The Fifth Circuit has suggested that this may be sufficient to negate a claim of purposeful discrimination. *See United States* v. *Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied* 107 S.Ct. 1625 (1987) (no hint of racial discrimination where two of the remaining twelve jurors were black).

B. *Discussion*

All potential jurors were questioned about their feelings on capital punishment. One juror, Joyce Willard, explained her views on the subject as follows:

> Well, I feel that-of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thoughts about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, them I'm not real sure what I—I don't know if I can give you an answer on that or not. I have mixed emotions about that.

(SF Voir Dire-VIII 3092). Willard later expressed reservations about imposing the death penalty for a murder that was not "premeditated." (*Id.* at 3095-96) The prosecutor told Willard that premeditation was not an element of capital murder. Rather, the state was only required to prove that the defendant "did knowingly or intentionally cause the death of an individual" while in the course of committing robbery. (*Id.* at 3098-99). . After the prosecutor explained the elements of the offense in more detail, Willard said:

> [I]f it is proven and you have proved that this gentlemen has done these two things, if he went in there and intentionally caused someone—in the process he killed someone and it was proven that this happened-I don't know if there were any witnesses or what, but—I would have to go along with the death penalty then.

(*Id.* at 3102). The prosecutor then asked Willard if she could serve on a death penalty jury. At first she replied:

> That is very difficult for me to decide. Like I say, a human life is on trial here. I know one has been taken and I don't believe in taking a human life, of course. I have always had kind of mixed emotions, but I felt like somebody who took someone's life should be assessed the death penalty. Like I say, I don't—I may be contradicting what I told you before. I don't know if I could really assess the death penalty to another human life. If it came down to the point where it was proven to me beyond a shadow of a doubt that he was guilty, then I'm sure I could.

(*Id.* at 3106-07). Willard became equivocal upon further questioning by the prosecutor. (*Id.* at 3110-113). When pressed for a definite answer as to her ability to serve on the jury, Willard responded "no." The prosecutor then asked:

> Are you telling me that you would not take the oath because you don't feel like you are suited or you can serve on this type of a jury? If you're telling me that, that's fine.

Willard answered, "I believe that's what I'm telling you." (*Id.* at 3117).

Defense counsel attempted to rehabilitate this juror. He asked whether she could follow her oath by rendering a verdict based on the law and the evidence. Willard responded:

> If I were on the jury and had to be a part of rendering the verdict, I guess it would be--it would be difficult to render a verdict even though, like I told you, I do believe in capital punishment. If that was what was necessary to do and I were on the jury, I probably could go along even though it would be with me for the rest of my life.

(*Id.* at 3122). Willard continued to speculate as to her ability to take the oath: At one point Willard told defense counsel that she "would have to take the oath before I could be on the jury," but "I wouldn't want to." (*Id.* at 3124, 3127-28).

Eventually, the trial court intervened. The judge asked Willard if her personal feelings would interfere with her judgment about the law and the evidence in the case. Willard said, "Well, knowing me I would probably break down." (*Id.* at 3143). However, she reluctantly acknowl-

edged her ability to answer the special issues based on the evidence. (*Id.* at 3148-49).

The judge then asked:

> Q: (THE COURT]: [C]an you take the oath to follow the law and then discharge your duties as a juror or can you not take an oath and do that, that is discharge your duties as a juror, whatever they may call you to do? Can you give me a yes or no and there won't be any more questions?
>
> A: WILLARD: I guess I better answer you no.
>
> Q: Ms. Willard, no, you could not take the oath, right?
>
> A: I don't guess I could after all these things have been put to me. I thought maybe I could, but after the way things have been presented to me and the way I'm understanding things, if I'm understanding correctly, then I don't believe I could.

Q: One foal quibble with you. You used the words I think and unfortunately—you said no and then you said I think. Is it no, I cannot do it or yes, I can do it or—

A: Okay. We'll put no I cannot do it.

(*Id.* at 3150-51).

The trial court excused Willard for cause. Petitioner now contends that Willard only began expressing doubts about her ability to sit on the jury after the prosecution presented a distorted and manipulative view of Texas law. He accuses the prosecutor of attempting to sow artificial doubt in the mind of this juror by "hammer[ing] home the grisly realities of the death sentence, while offering [her] an "escape hatch" to avoid jury service by implying that she need not serve if doing so would trouble her conscience." (Am. Petition at 293). The Court has carefully reviewed the voir dire examination and finds no evidence of impropriety. Evidently, neither did defense counsel since he never objected to any of the prosecutor's questions. The lengthy colloquies involving Willard's ability to take the oath and serve on the

jury were the result of her own indecision and equivocation—not any improper questioning by the prosecutors.

Petitioner further argues that there was no legal basis to strike Willard for cause. He points out that Willard believed in capital punishment. She merely "expressed hesitation and emotional turmoil at the prospect of rendering a verdict that would result in another person being killed." (Am. Petition at 303). If this were the extent of her testimony, Willard might not be disqualified. *See, e.g. Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir.1981), *aff'd on reh'g*, 695 F.2d 124 (5th Cir.1983) (jurors who favored capital punishment and could vote to inflict the death penalty were not disqualified because of inability to sign verdict form). However, Willard also stated that she could not take the oath and discharge her duties as a juror. At best, her testimony was ambiguous and contradictory. (SF Voir Dire-VIII 3146, 3148-49, 3115, 3127). The trial court struggled with this issue and concluded that "[Willard's] view about participating in the death penalty process would prevent or substantially impair her performance of her duties as a juror in this case." (*Id.* at 3155). As the Supreme Court has noted:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . *[T]his is why deference must be paid to the trial judge who sees and hears the jurors.*

Witt, 105 S.Ct. at 852 (emphasis added). Such is the case here. The trial judge had an opportunity to observe Willard's demeanor and assess her credibility. He ulti-

mately concluded that she could not take the oath and accept the duties of her office. Petitioner has failed to establish that this determination was "unreasonable . . . . in light of the evidence presented in the state court." 28 U.S.C. § 2254(d). This ground for relief should be overruled.[19]

VI.

COMPETENCY

(Grounds 3 & 4)

Petitioner raises two arguments regarding his mental competency. First, he contends that the trial court should have conducted a competency hearing. Second, he claims that he was not competent to stand trial.

A. *Applicable Law*

Due process prohibits the trial of a defendant who is mentally incompetent. *Godinez v. Moran*, 509 U.S. 389, 396,113 S.Ct. 2680, 2685, 125 L.Ed.2d 321(1993); *Pate* v. *Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838,15 L.Ed.2d 815 (1966). This means that a defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . ." *Drope* v. *Missouri*, 420

[19] Although not mentioned in his brief, petitioner has provided the Court with a copy of the Findings and Recommendation of Magistrate Judge Charles Bleil in *Troy Dale Farris* v. *Gary Johnson*, No. 4-94-CV-0142-Y (N.D. Tex. January 21, 1997) (Am. Petition, Exh. 35). The issue presented in Farris is similar to the one raised by petitioner in the instant casewhether a prospective juror was improperly excused for cause based on her opposition to the death penalty. Judge Bleil noted that the juror consistently maintained she could answer the special issues on punishment and follow the law given by the court. Consequently, there was no legal basis to challenge the juror for cause. *Farris*, No. 4-94-CV-0142-Y, op. at 55-56.

Unlike the juror in *Farris*, Joyce Willard said that she could not take the oath or discharge her duties as a juror. This fact alone distinguishes the two cases. More importantly, Judge Bleil's recommendation was rejected by the district judge. *Farris* v. *Johnson*, 967 F.Supp. 204, 206 (N.D. Tex. 1997), aff'd, 144 F.3d 50 (5th Cir.) (Table), *cert. denied*, 119 S.Ct. 516 (1998). Therefore, Farris does not dictate a contrary result.

U.S.162,171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). *See also Dusky* v. *United States*, 362.U. S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The burden of establishing mental incompetency is extremely heavy. In order to obtain habeas relief, a petitioner must show that the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' as to his mental competency at the time of trial." *Dunn* v. *Johnson*, 162 F.3d 302, 306 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1507 (1999), *quoting Washington* v. *Johnson*, 90 F.3d 945, 950 (5th Cir. 1996), *cert. denied*, 117 S.o. 1259 (1997).

State courts must employ procedures designed to protect against the trial of incompetent defendants. *Drope*, 95 S.Ct. at 904-05; Pate, 86 S.Ct. at 842-43. A competency hearing is required "if the evidence raises a bona fide doubt as to the defendant's competency at that time." *Lokos* v. *Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). The trial court should consider: (1) any history of irrational behavior; (2) the bearing and demeanor of the defendant in court; and (3) prior medical opinions. *See Dunn*, 162 F.3d at 305; *Reese* v. *Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cert. denied*, 100 S.Ct. 487 (1979).

B. *Medical Evidence*

Petitioner was shot by Houston police officers at the time of his arrest on November 21, 1985.[20] He sustained serious abdominal injuries and was taken to Ben Taub Hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a doublebarreled colostomy. Petitioner remained hospitalized for eight weeks. During this time, he experienced complications and underwent an exploratory laparotomy to remove adhesions. Petitioner lost a total of 57 pounds during his

[20] Petitioner fled to Houston after he killed a motel clerk in Irving, Texas. He was apprehended five days later by Houston police officers. The shooting occurred when petitioner approached one of the officers with a KG99 machine gun as he was attempting to evade arrest. (SF Trial-II 687, 698-704).

hospital stay. He was eventually discharged to the custody of Harris County officials on January 12, 1986. (Am. Petition, Exh. 18).

Four days later, petitioner arrived at the Dallas County Jail. He complained of pain at his colostomy site and swollen extremities. Petitioner was treated with a variety of medications and placed on a double portion diet to regain weight. Jail records show that petitioner began experiencing chest pain on January 21, 1986. The next day, his symptoms included "chills and fever." Petitioner was given Motrin and Septra, an antibacterial medication. A wheelchair was ordered so he could go to court. However, petitioner no longer needed a wheelchair by the time jury selection began on February 3, 1986. (*Id.*, Exh. 21 & 22).

At the end of the first week of jury selection, petitioner still had chest pain, chills, and fever. This prompted the trial judge to order a medical evaluation. (*Id.*, Exh. 21). Petitioner was taken to Parkland Hospital on February 10, 1986, where he was diagnosed with pneumonia. He was discharged the same day with a prescription for Darvocet and Erythromycin. (*Id.*, Exh. 24). Jury selection resumed the next morning.

Petitioner continued to complain of chest pain throughout the month of February. He also reported delays in the receipt of his medication.[21] On February 19, 1986, the trial judge asked the jail doctor to determine whether petitioner needed more pain medication for his "well-being." (*Id.*, Exh. 27). Dr. Adrian Collyns responded to this inquiry on February 24, 1986. He advised the judge:

> I have seen this man professionally on a number of occasions recently. A chest Xray on Feb. 21, 1986 was done. In my opinion he does not now require prescription pain killers.

(Am. Petition at 231).

[21] Petitioner alleges that the jail medical staff "continually failed to [administer] his antibiotics and pain medication on schedule." (Am. Petition at 22.7). Tae Court acknowledges that the medical records are less than clear on this point. However, this ambiguity does not necessarily establish that the medications were not given as directed.

The next day, defense counsel protested that petitioner had not been getting his medication on a regular basis. Petitioner then told the judge that he had not seen a doctor since his last visit to Parkland Hospital on February 10, 1986.[22] The judge replied:

> [THE COURT]: Mr. Cunningham and Mr. West, the only thing I can say—first of all, I received a letter from a Dr. Adrienne [sic] H. Collyns, which I'll make part of the Court's file, and it says in so many words, as of February 24th, he does not have the opinion that the Defendant needs pain killer prescriptions. Now, whether he needs other medicines, I don't know. I'm not obviously a doctor. I'm going to be guided by what the jail doctors say. If you-all have any suggestions, I'll be glad to help you in any way I can.
>
> [DEFENSE COUNSEL]: If he says as of February 24th, that would be yesterday and I don't know if the doctor. would say that if he hasn't seen him.
>
> [THE COURT]: I got this letter delivered to me late yesterday afternoon after we recessed.
>
> [DEFENSE COUNSEL]: I would ask the Court to at least have whoever that doctor is examine Mr. Miller-El and I would also like to talk with him to see whether or not-what he is using to base that on for Mr. Miller-El's benefit because he tells Mr. West and he tells myself that he's hurting and he needs some medicine. We don't want him to think that we're not advising the Court.

[22] Petitioner acknowledged that he had seen a nurse as recently as February 20, 1986, but "they say that they can't do nothing." (SF Voir Dire-VII 2782).

> [THE COURT]: I'm advised and I'm pretty well guided by what the doctor says. Let me suggest that you and Mr. West talk to Dr. Collyns or the jail nurse up there and see what their answers are to your questions. If there is a dispute, I'll be glad—
>
> [DEFENSE COUNSEL]: Mr. West will track it down, Judge, and we'll go on with Ms. Williams.

(SF Voir Dire-VII 2782-84).

Petitioner was examined again by Dr. Collyns on February 26, 1986. He complained of constant chest pain that worsened at night. The doctor noted some tenderness and mild swelling over the right inferior scapula area. His lungs were clear with good breath sounds. Based on the results of this examination, Dr. Collyns concluded that petitioner was "fit to attend court." (Am. Petitioner, Exh. 21).

These symptoms persisted for several more days. During this time, petitioner continued to receive antibiotics and nonprescription medications. Then on March 4, 1986—just two days before jury selection coucluded—petitioner was taken to Parkland Hospital for treatment of a chest abscess. He developed an infection and returned to the hospital six days later. A follow-up visit was scheduled for March 12, 1986 However, wound care was provided by the jail medical staff instead. (*Id.*, Exh. 21 & 22).

The next entry in petitioner's medical chart is dated March 20, 1986—one week after the trial began. Petitioner complained of soreness around his rib cage and asked to see a doctor. The next day, the following exchange occurred in open court:

> [PROSECUTOR]: Mr. Hall, you have previously identified the man sitting at the end of the table-
>
> [DEFENSE COUNSEL]: Your Honor, we'll object. He's not *sleeping.*
>
> [PROSECUTOR]: Well, he was when I was—
>
> [DEFENSE COUNSEL] : Your Honor, I would object to the side-bar remark.

> [THE COURT]: Sustained. Disregard that, ladies and gentlemen.

(SF Trial-III 1151) (emphasis added).[23] The trial court then recessed the proceedings until March 24, 1986.

Shortly after the trial resumed, the state concluded its case-in-chief. The defense rested without presenting any evidence and both sides closed. At that point, the trial judge advised petitioner of his right to testify and the consequences of doing so. Petitioner said that he understood his rights but did not want to testify. The court then stated:

> [THE COURT]: [I]t might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these decisions on his own behalf
>
> [DEFENSE COUNSEL]: *Your Honor, to the best of my knowledge, Mr. Miner-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?*
>
> [DEFENDANT]: Yes.
>
> [THE COURT]: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course, will honor it.

(*Id.* at 1197-98) (emphasis added).

The guilt-innocence phase of the trial ended that day with a finding of guilt. Later that evening, petitioner com-

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[23] It is not clear whether the prosecutor actually referred to petitioner as 'the man sleeping at the end of the table' or whether defense counsel misunderstood the question. However, the record reflects that petitioner was seated at the end of the table next to his attorneys. (SF Trial-I 419).

plained of nausea and a problem with his colostomy bag. (Am. Petition, Exh. 21). The trial judge ordered a medical evaluation to determine whether petitioner was "able to sit thru court." (*Id.*, Exh. 29). Petitioner was taken to Parkland Hospital and kept overnight for treatment of a small bowel obstruction. (*Id.*, Exh. 24). The punishment phase of the trial commenced on March 25, 1986—the same day petitioner was released from the hospital. The following afternoon, the jury sentenced him to death. Petitioner continued to have problems with his colostomy bag and recurrent infections over the next eight months. His condition finally improved after surgeons closed his colostomies in November 1986. (*Id.*, Exh. 21, 24, 30-32).

C. *State Habeas*

Proceeding Petitioner did not challenge his mental competency on direct appeal. Instead, he first raised the issue in an application for writ of habeas corpus.[24] Petitioner alleged, *inter alia*, that he was not competent to stand trial due to his debilitating physical injuries, complications arising from his surgeries, and the side effects of pain medication. The state answered these allegations in a written response. Both parties submitted supplemental briefs and expert affidavits in support of their respective positions.

The state relied on the Affidavit of Steven P. Bowers, Medical Director for the Dallas County Jail System. Dr. Bowers reviewed selected portions of petitioner's medical records and a chronology of events prepared by the state. He noted that petitioner was on a number of medications during his trial. However, the only medication that might have affected him to any degree was Darvocet. Dr. Bowers explained that Darvocet is "relatively low in strength compared to other prescription pain medications." According to the medical records, petitioner received two Darvocet tablets three tunes a day. This is less than the maximum allowable dosage. Dr. Bowers found no indication that petitioner was impaired by any of his medications. He did not exhibit a pattern of recurrent drowsiness, stupor, being difficult to arouse, or any bizarre behavior. Although petitioner was transported to the hospital several times during his trial, Dr. Bowers noted that each treatment was less than 24 hours in duration. This indicated that most of his medical problems were not serious. Based on this evidence, Dr. Bowers concluded that petitioner was competent to stand trial and assist in his defense. (Am. Petition, Exh. 25).

[24] Petitioner filed his application for post-conviction relief on May 16, 1995—nearly nine years after his trial concluded and just hours before his scheduled execution.

Petitioner countered with the Affidavit of Ari Kiev, a board-certified psychiatrist. Dr. Kiev reviewed all of petitioner's medical records and evidence submitted by both parties in the state habeas proceeding. This evidence showed that petitioner was in a weakened condition at the time of his discharge from Ben Taub Hospital on January 12, 1986. Petitioner was anemic, had a substantially reduced blood volume, and lost a considerable amount of weight. He also experienced complications with his colostomies, suffered from pneumonia, developed recurrent infections, and frequently complained of pain throughout the trial. Dr. Kiev noted that petitioner was medicated with Darvocet, which "can sometimes produce sedation and dizziness as side effects." He believed that petitioner may have experienced some of these symptoms while taking the medication. Dr. Kiev stated that the combination of these factors, together with an inadequate diet and sleep deprivation, "contributed to an inability of [petitioner] to participate fully and to the best of his normal abilities in the preparation and presentation of his own defense . . ." He then offered this rather bold assessment of petitioner's mental state:

> [Petitioner], because of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, had given up and resigned himself

> to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances.

Dr. Kiev surmised that petitioner "would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of suicidal intent to end his life." In his opinion, petitioner should have been evaluated to determine his mental competency. (*Id.*, Exh. 19).

The trial court resolved this conflicting evidence in favor of the state. Specifically, the court found that: (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial." (*Id.*, Exh. 34 at ¶¶ 17-21). The judge based his findings on the exhibits submitted by both parties, the chronology of events prepared by the state, and his own recollection. After conducting an independent review of the record, the Texas Court of Criminal Appeals reached the same conclusion and denied habeas relief. *Ex parte Miller-El*, No. 31,001-01.

D. *Discussion*

Petitioner argues that the state habeas proceeding was flawed in four respects: (1) the chronology of events prepared by the state omitted significant information and misrepresented critical facts about his medical condition; (2) the Affidavit of Dr. Steven Bowers was incomplete and unreliable; (3) the trial court ignored his evidence; and (4) the state improperly submitted its proposed findings of fact and conclusions of law to the trial court *ex parte*. As a result of these defects, petitioner contends that he was denied a full and fair opportunity to litigate his competency claim in state court. He therefore seeks a *de novo* review in federal court.

A federal habeas petitioner is entitled to a *de novo* review of a state court's competency determination only "when

he makes a showing by clear and convincing evidence to raise threshold doubt about his competency." *Carter* v. *Johnson*, 131 F.3d 452, 460 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1567 (1998), *quoting Lokos*, 625 F.2d at 1261. In order to raise such a doubt, a petitioner must present facts sufficient "to positively, unequivocally and clearly generate a real, substantial and legitimate doubt" concerning his mental capacity. *Carter*, 131 F.3d at 460 (citations omitted); *see also United States* v. *Willians*, 819 F.2d 605, 609 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 726 (1988). Petitioner has failed to meet this heavy burden. Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense. To the contrary, defense counsel told the trial judge that petitioner was competent to stand trial and make decisions on his own behalf.[25] Petitioner agreed with that assessment. (SF Trial-III 1198). This fact, standing alone, is persuasive evidence that no Pate violation occurred. *See, e.g. Moody v. Johnson*, 139 F. 3d 477, 482 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998); Reese, 600 F.2d at 1092.

Moreover, the trial judge had an opportunity to observe petitioner's demeanor and behavior on a daily basis over an eight-week period. The judge ordered at least two medical evaluations to determine whether petitioner was "able to sit thru court." (Am. Petition, Exh. 27 & 29). None of the doc-

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[25] E. Brice Curmingham, lead trial counsel for petitioner, told the state habeas court that he was unaware of the "full gravity" of his client's *medical* condition. Cunningham testified:

> After learning more about (petitioner's medical condition] at the time of his trial, Trial Counsel would have brought the matter of Mr. Miller-El's medical condition to the court's attention, requested a Hearing to determine this fact, and would have done whatever was possible to assure Mr. Miller-El's receiving the best possible medical attention, either in the Dallas County Jail, Parkland Memorial Hospital, or some other medical facility chat could have dealt with his problem. (Am. Petition, Exh. 28 at 6). Significantly, Cunningham never stated that these medical problems prevented petitioner from cooperating with his lawyers or assisting in the presentation of his defense.

tors who examined petitioner raised any concerns about his mental competency. In addition, petitioner was questioned by his attorneys and the trial judge at various points throughout the proceeding. He answered all questions in a direct and coherent manner.[26] This evidence further undermines petitioner's competency claim.

Petitioner points out that his expert, Dr. An Kiev, thoroughly reviewed all the medical evidence and concluded that he was mentally incompetent to stand trial. The Court acknowledges that the affidavit prepared by Dr. Kiev is more detailed than the affidavit submitted by Dr. Bowers. However, this does not require the trial court to credit his testimony. Although Dr. Kiev opined that petitioner was unable to "participate fully and to the best of his normal abilities in the preparation and presentation of his own defense," the trial judge was entitled to rely on his own observations and the testimony of Dr. Bowers in reaching a different conclusion. *See Carter*, 131 F.3d at 461. Moreover, the Fifth Circuit has twice found similar expert psychiatric testimony insufficient to prove a "real, substantial and legitimate doubt concerning mental competency so as to overcome the presumption of correctness attached to state court findings. *See id.*; *Williams*, 819 F.2d at 608-09. The fact that the trial court did not mention Dr. Kiev's affidavit in its findings does not overcome this presumption. *See Carter*, 131 F.3d at 461.

Nor is the anecdotal evidence cited by petitioner sufficient to rebut the state court funding. Petitioner refers to his repeated requests for pain medication and a comment made by the prosecutor that he was sleeping in court. There is no doubt that petitioner experienced some pain as a result of his physical injuries, pneumonia, and recurrent wound infection. However, there is no objective medical evidence

[26] Petitioner attempts to minimize the significance of his answers by characterizing them as single-word responses. (Am. Petition 238 n.43). However, the record shows that petitioner answered several questions with complete sentences. (SF Voir Dire-III 2779-84; Punishment- 11 17-19).

that this pain or the side effects of his medication prevented petitioner from assisting in the preparation and presentation of his defense. Similarly, the prosecutor's ambiguous remark hardly constitutes clear and convincing evidence of mental in competency. A careful reading of the record discloses that the prosecutor never accused petitioner of sleeping in court. Rather, he asked if a witness could identify petitioner as "the man sitting at the end of the table." Defense counsel apparently misunderstood the question and pointed out that petitioner was "not sleeping." (SF Trial-III 1151) (emphasis added).

Petitioner has failed to show that there are sufficient facts to "positively, unequivocally and clearly generate a real, substantial and legitimate doubt" as to his mental competency at the time of trial. *Moody*, 139 F. 3d at 481; *Carter*, 131 F.3d at 464. Therefore, any defects in the state habeas proceeding were immaterial. This ground for relief is without merit and should be overruled.

VII.

RELIGIOUS AFFILIATION

(Ground No. 6)

Finally, petitioner contends that the prosecutor improperly referred to his religious affiliation and disparaged his beliefs during the punishment phase of the trial.

A. *Applicable Law*

The First Amendment protects the right of an individual to join groups and associate with others holding similar beliefs. *Citizens Against Rent/Control Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). This precludes the state from introducing evidence of a defendant's "abstract beliefs" during the punishment phase of a criminal trial. *Dawson* v. *Delaware*, 503 U.S.159, 168, 112 S.Ct.1093, 1099, 117 L.Ed.2d 309 (1992). However, such evidence is admissible if it is sufficiently related to issues involved in the case. *Id.*, 112 S.Ct. at 1099; *Fuller* v. *Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert.*

denied, 118 S.Ct. 399 (1997); *Boyle* v. *Johnson*, 93 F.3d 130, 183 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 968 (1997).

B. *Discussion.*

Petitioner belongs to a Muslim sect known as the Moorish Science Temple. Members of this religious group typically wear turbans and other distinctive articles of clothing. Approximately two weeks before the murder, petitioner attended a Moorish Feast at the Holiday Inn South in Irving, Texas. Two hotel employees identified petitioner as one of the participants at this function. Donald Ray Hall, the chief night auditor, testified that petitioner "was dressed in like a Moslim [sic] outfit and he had on a turban." (SF Trial-I 420).

Philip Bond, the hotel manager, testified that several attendees "had turbans on their heads." (*Id.* at 27). Petitioner did not object to this testimony, and tacitly concedes that this evidence was admissible at the guilt innocence phase of the trial to prove his identity.[27] However, petitioner maintains that the prosecutor crossed the line when he questioned Stanley January during the punishment hearing. January testified that he met petitioner as part of a scheme involving illegal drugs. After January described his involvement in this scheme, the prosecutor inquired:

> Q: [BY PROSECUTOR]: Let me ask you: Did Thomas join some sort of political organization?
>
> A: [BY WITNESS]: Muslims, which is the Moorish Science Temple.
>
> Q: Temple of America?
>
> A: Yes.
>
> Q: They are Muslims?
>
> A: Yes.
>
> Q: Did they attempt to get you to join their group?

[27] The trial court found that petitioner's affiliation with the Moorish Science Temple was relevant "to proving [his] identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification . . . (Am. Petition, Exh. 34 at ¶ 111).

> A: Well, me and Thomas Miller-El had a fall-out because he said that I wasn't into, you know, the Moorish Science Temple of America, and so by me not being into that, he just trusted me a little bit.

(SF Punishment-II 54-55). The prosecutor made two other references to petitioner's "so-called religious organization" while examining January. (*Id.* at 69, 80). He returned to this issue during closing argument:

> There's not a whole lot you can do for Don Hall, but there is about a million and a half other people that still live here and don't want this community turned into a war zone, where people like Miller-El can indulge in conduct that amounts to paramilitary activities, crime, whatever you want to call it: criminal behavior, whatever; whether it's political, philosophical, *religious or whatever*, if it's motivated by the facts in this case that show you it's uncontrollable and insatiable greed, nonetheless, it leaves in its wake what it left here.

(SF Punishment Arg. 5) (emphasis added).

The state court found that the prosecutor did not criticize or degrade petitioner's religious philosophy, beliefs, or practices. Moreover, the court found that the admission of this evidence did not inflame or prejudice the jury against petitioner on religious grounds. (Am. Petition, Exh. 34 at ¶ 85). Petitioner has failed to rebut these findings by clear and convincing evidence. The passing references to his "so-called religion" and possible religious motivation for the crime are equivocal at best.[28] In addition, the jury was already aware of petitioner's religious affiliation because it was properly introduced into evidence during the guilt-innocence phase of the trial. Petitioner has failed to estab-

[28] Indeed, petitioner acknowledges that "it is impossible to determine what role the Moorish Science Temple evidence played in his death sentence." (Am. Petition at 336).

lish an error of constitutional magnitude that justifies federal habeas relief.

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be denied.

DATED: January 31, 2000.

/s/ Jeff Kaplan

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE

IN THE
UNITED STATES DISTRICT COURT
for the NORTHERN DISTRICT of TEXAS,
DALLAS DIVISION

Civil No. 3:96-CV-1992-H

THOMAS JOE MILLER-EL

Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice Institutional Division

Respondent.

MEMORANDUM OPINION AND ORDER

This is a death penalty case.

Before the Court are the Findings and Recommendation of the United States Magistrate Judge, signed January 31, 2000; and Petitioner's Objections, filed February 25, 2000. Magistrate Judge Kaplan recommended that Miller-El's habeas corpus petition be denied. Pursuant to Fed. R. Ci. P. 72(b), this Court has made a *de novo* review of the portions of the Magistrate Judge's disposition objected to by Petitioner. Additionally, the Court heard oral argument from Petitioner and Respondent on April 25, 2000.

Based on the pleadings, evidence, and arguments of counsel, the Court hereby ADOPTS the findings and recommendation of the Magistrate Judge, except as MODIFIED below. Miller-El's petition for a writ of habeas corpus is DENIED.

I. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA") STANDARD

At the outset, the Court recognizes the recent changes in habeas jurisprudence. Pursuant to the AEDPA, a federal

court may not grant habeas relief on any claim that was adjudicated on the merits in a state court proceeding unless the petitioner shows that the prior adjudication: (1) resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established federal law;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Until very recently, the Fifth Circuit had held that an application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard* v. *Johnson*, 97 F.3 d 751, 769 (5th Cir.1996).

The Supreme Court recently suggested that this standard is erroneous. *See Williams v. Taylor*, _U.S._, 120 S.Ct.1495 (2000). In *Williams*, decided April 18, 2000, the Court criticized the Fifth Circuit's standard:

> The 'all reasonable jurists standard' would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its 'reasonable jurist' standard in just such a subjective manner. *See Drinkard v. Johnson*, 97 F.3d 751, 769 (1996). . . .

Williams, 120 S.Ct. at 1521-22. It appears that the *Drinkard* opinion has been overturned to the extent it required a subjective inquiry into what is an "unreasonable application" of facts to the law. The Supreme Court went on to ostensibly clarify that, under AEDPA, a state court decision may be incorrect or erroneous application of the law to the facts, but may not be an unreasonable application. *See Williams*, 12 S.Ct. at 1522.

The Magistrate Judge made his recommendation before *Williams* v. *Taylor* was decided, and cited the *Drinkard* "reasonable jurists" standard of review. Therefore, the Court modifies the portions of the Magistrate Judge's recommendation that rely on *Drinkard*. (Magistrate's Findings at 3, 23). However, upon review of the pleadings, the Court finds that the change in the standard review has no determinative effect on the findings of the Magistrate Judge.

II. BATSON[1] AND SWAIN[2] CLAIMS

A. Swain claim

The Court agrees with the Magistrate Judge that Swain does not provide an independent basis for challenging the prosecutor's use of peremptory challenges, and that Petitioner's claim must be analyzed under *Batson*. In each of the cases cited by Petitioner that allow relief under *Swain* (Petition at 179, 184; Objections at 9 n. 4), *Batson* was found inapplicable because it was decided after the defendant's conviction and appeal. Miller-El cites no case that grants Swain relief in which *Batson* was also applied to the prosecutor's use of peremptory challenges. Therefore, the Magistrate Judge's recommendation on the Swain claim is accepted in whole.

B. Batson claim

The principal legal objection to the Magistrate Judge's recommendation on the *Batson* claim is that the Magistrate should have placed more weight on the strong evidence of discrimination in jury selection by Dallas County District Attorneys at the time of Petitioner's trial. Petitioner cites the plurality in *Hernandez v. New York*, 500 U.S. 352 (1991) for the proposition that the trial judge must take all evidence into account in the third step of the Batson inquiry—whether the Defendant has proved purposeful discrimination. However, *Hernandez* also stands for the deference of a federal habeas court to the credibility determination of the state trial judge in determining discriminatory intent. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). The Magistrate judge properly deferred to the experience of the trial court judge in evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination.

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[1] *Basson v. Kentucky*, 476 U.S. 79 (1986).

[2] *Swain v. Alabama*, 380 U.S. 202 (1965).

Petitioner's objections to the Magistrate's factual findings are overruled. The Magistrate Judge did not "discount the massive evidence" in support of the first step of the *Batson* inquiry—the prima facie case that the prosecutor excluded jurors solely on the basis of their race. Rather, the Magistrate noted that an inference of purposeful discrimination had already been found by the Court of Criminal Appeals, and determined that further discussion of the evidence in support of the prima facie case was unnecessary.

III. COMPETENCY CLAIMS

Miller-El's first objection is that the Magistrate Judge failed to conduct a *de novo* review of his *Pate*[3] and *Dusky*[4] claims. Miller-El cites no authority for the proposition that a state trial court's adoption of one party's proposed factual findings and legal conclusions corrupts the judicial process so that his claim is not "adjudicated on the merits" under 28 U.S.C. § 2254(d). Equally, there is no authority that the Fifth Circuit has adopted the pre-AEDPA Townsend[5] exceptions to the presumption of correctness in 28 U.S.C. § 2254(4) and 28 U.S.C. § 2254(e)(1).

Miller-El's second objection is that the Magistrate Judge did not expressly address his *Pate* claim. This Court holds that the Magistrate's factual findings show that the *Pate* claim is not meritorious. Objectively considered, the information received by the trial court regarding Miller-El.

El's condition would not have alerted him to the possibility that Petitioner could not rationally aid his attorney in his defense. Both the Petitioner and his attorney, as well as the trial judge, state on the record that Miller-El was competent and aware of the proceedings. The Court finds that Petitioner has not established a *Pate* claim.

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[3] *Pate* v. *Robinson*, 393 U.S. 375 (1966).

[4] *Dusky* v. *United States*, 362 U.S. 402 (1960).

[5] *Townsend* v. *Sain*, 372 U.S. 293 (1963).

Finally, the Court overrules Petitioner's objections to the Magistrate Judge's factual findings, as they are supported by the record in this case.

IV. CHALLENGE FOR CAUSE

The Magistrate Judge held that juror Joyce Willard was not improperly excluded from the jury panel in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Petition's objections point to no demonstrable error of law or fact. Therefore, the Court adopts the Magistrate Judge's findings and recommendation as to Petitioner's fifth ground for relief.

V. IMPROPER MENTION OF RELIGIOUS AFFILIATION

Petitioner claims that references to his membership in the Moorish Science Temple a the guilt-innocence and sentencing phase of this trial were in violation of *Dawson v. Delaware*, 503 U.S.159,165 (1992). While there is no "per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," the government may only use such evidence when it is sufficiently related to the issues involved. *Dawson* v. *Delaware*, 503 U.S. 159,165 (1992).

Petitioner objects that the Magistrate Judge did not explain the significance of the few references to Petitioner's religious affiliation at the punishment stage. The Court finds that, as evidence had been submitted at trial that other members of the Moorish Science Temple were armed and involved in crime, the references to Miller-El's membership in this group were related to the issue of future dangerousness. *See, e.g., Fuller* v. *Johnson*, 114. F.3 d 491, 498 (5th Cir. 1997), *cert denied*, 522 U.S. 963 (1997).

VI. CONCLUSION

Subject to the modifications above, the Court ADOPTS the Magistrate Judge's Findings and Recommendations. Miller-El's Petition for Writ of Habeas Corpus is hereby DENIED.

SO ORDERED

DATED: June 5, 2000

/s/ BAREFOOT SANDERS
BAREFOOT SANDERS
Senior U.S. District Court Judge
Northern District of Texas

United States Court of Appeals,
Fifth Circuit

THOMAS JOE MILLER-EL,
Petitioner-Appellant,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent-Appellee.

No. 00-10784
Aug. 7, 2001

[261 F.3d 445]

Before JONES, DeMOSS and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

Petitioner Thomas Joe Miller-El ("Miller-El"), who was convicted of capital murder in Texas state court and who was sentenced to death therefor, and whose petition for habeas corpus relief and request for a Certificate of Appealability ("COA") therefrom were both denied by the federal district court below, now seeks from this Court a COA pursuant to 28 U.S.C. § 2253(c)(2). For all of the reasons set forth below, we DENY the request for a COA.

I. BACKGROUND

In 1985, Miller-El's wife, Dorothy Miller-El, was employed as a night maid for the lobby area of the Holiday Inn South. She arranged for a religious convention for the Moorish Science Temple's Feast on November 8-10, 1985. Her husband was among the attendees. After the convention, Dorothy did not return to work. Shortly before midnight on

November 15, 1985, Dorothy returned to the Holiday Inn claiming that she was there to pick up her paycheck. She was given access to the office area near the vault. During this time period, four hotel employees were working, Doug Walker, Donald Hall, Anthony Motari, and Mohamed Ali Karimijoji. Hall, the chief auditor, was training Mohamed regarding the hotel's daily closing procedures. Hall instructed Mohamed to close out the cash registers, a process which would take one-half hour. Mohamed encountered a woman who claimed that she needed accompanying while she waited for her ride. Mohamed sent her to the front desk area without leaving the locked area he was in.

At the front desk, a man later identified as Miller-El appeared and requested a room from Hall. Witnesses identified Miller-El from having seen him at the Moorish Feast convention the previous week. A younger man, later identified as Kenneth Flowers and dressed in army fatigues and a headset, peered around the corner as Hall was giving Miller-El his room key, and once spotted by Hall, he also approached the counter. Miller-El told Hall that he would be needing two beds. Seconds later, Miller-El and Flowers pulled out weapons. Miller-El brandished a semiautomatic "tech" nine millimeter machine **[448]** gun, with a flash suppressor for night use. Flowers had a .45 caliber hand gun.

Hall complied with Miller-El's instructions to empty the cash drawer and place the money on the counter. Miller-El then ordered Hall to bring any other people in the back out front. Hall instructed Walker to come out. Flowers jumped over the counter and the two men instructed Hall and Walker to lay on the floor. The two men led Hall and Walker to the bellman's closet which they ordered opened. Once the two men removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. Flowers did the same to Hall. Walker was laid on his face and Hall was laid on his side.

Miller-El asked Flowers if he was going to "do it" and Flowers responded that he couldn't. Flowers then left.

Miller- El stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard familiar voices outside, Hall screamed for help.

Several days after the robbery-murder, Officer Cagle was on surveillance of an apartment complex believed to be Dorothy Miller-El's. He spotted Dorothy and Flowers. With the assistance of back-up units, he stopped their vehicle and arrested them both. Search warrants were executed for the residence, and "walkie-talkie" headsets were found. When Miller-El was later arrested, found in his possession was an arsenal of weapons including the "tech" nine millimeter murder weapon.

II. PROCEDURAL HISTORY

Miller-El pleaded not guilty to and in March 1986 was tried before a jury on the charge of capital murder during the course of committing a robbery.

On March 24, 1986, the jury returned with a guilty verdict and at the conclusion of the sentencing phase, the same jury answered in the affirmative to the special issues set forth in the Texas Code. Accordingly, the trial court imposed upon Miller-El the sentence of death.

Miller-El's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 14, 1992, that court affirmed Miller- El's conviction and sentence in an unpublished opinion. *See Miller-El* v. *State*, No. 69,677 (Tex. Crim. App. 1992) (en banc) (unpublished). And on October 4, 1993, the Supreme Court denied Miller-El's petition for writ of certiorari. *See Miller-El* v. *Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.E4.24 67 (1993).

Miller-El then filed an application for state habeas relief. The state trial court judge entered findings of fact and conclusions of law recommending denial of Miller-El's state habeas petition. On June 17, 1996, the Texas Court of Criminal Appeals adopted the trial judge's findings of fact

and conclusions of law and denied Miller-El's application for state habeas corpus relief. *See Ex parte Miller-El*, No. 31,001-01 (Tex.Crim.App.1996) (unpublished).

On June 17, 1997, Miller-El filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal district court. On August 12, 1997, Miller-El filed an amended petition for habeas corpus. Miller-El's petition was referred to a magistrate judge who, on January 31, 2000, issued findings and conclusions, recommending a denial of relief. On June 5, 2000, after receiving objections and conducting **[449]** a hearing on the magistrate judge's report and recommendation, the district court adopted the magistrate's findings and conclusions and denied Miller-El's petition for a writ of habeas corpus. The district court subsequently denied Miller- El's motion to alter or amend the final judgment denying relief on June 21, 2000. Miller-El then filed a notice of appeal in this Court and a motion for a COA in the district court. On August 14, 2000, the district court denied Miller-El's request for a COA on each of the issues raised herein. It is Miller-El's renewed request for a COA that is presently before us.

III. DISCUSSION

Miller-El seeks from this Court a COA on each of the following issues: (1) whether the district court erred in overruling his challenges of improper peremptory juror strikes; (2) whether the state court erred in failing to conduct a sua sponte evidentiary hearing regarding his competency to stand trial and in finding that he was competent to stand trial in 1986; (3) whether the district court likewise erred in failing to conduct a hearing regarding his competency; and (4) whether the district court erred finding that his First and Fourteenth Amendment rights were not violated by admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple.

Miller-El's petition for writ of habeas corpus was filed on June 17, 1997, and is thus governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh* v. *Murphy*, 521 U.S. 320, 117 S.Ct.

2059, 2068, 138 L.Ed.2d 481 1997); *United States v. Carter*, 117 F.3d 262 (5th Cir.1997.) Under AEDPA, before an appeal from the dismissal or denial of a *§ 2254* habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA. *See Slack* v. *McDaniel*, 529 U.S. 473,120 S.Ct. 1.595, L.Ed.2d .542 2000. A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See id.* at 1603-04.

Additionally, pursuant to § 2254(e)(1), a state court's determination of a factual issue must be presumed correct, and the habeas petitioner bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness is especially strong, where, as here, the trial court and the state habeas court are one and the same. *See Clark* v. *Johnson*, 202 F.3d 760, 764 (5th Cir., cent. denied, 531 U.S. 831, 121 S.Ct. 84, 148 L.Ed.2d 46 (2000).

And while the nature of the penalty in a capital case is an appropriate consideration for determining whether to issue a COA, the severity of the penalty at issue does not, in and of itself, require the issuance of a COA. *See Clark*, 202 F.3d at 764 (citing Lamb, 179 F.3d at 356). However, in capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner. *See Lamb*, 179 F.3d at, 356. Cognizant of the foregoing principles, we turn now to consider those issues raised by Miller-El in his request for a COA.

[450] A.

Miller-El first contends that he is entitled to a COA regarding his challenge to the prosecution's alleged improper use of peremptory strikes to exclude African-Americans from his jury. Miller-El argues that the Supreme Court's

decision in *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), is still the applicable law regarding challenges to improper peremptory strikes when evidenced by data indicating historic, systematic discrimination against African-Americans. However, during the pendency of Miller-El's direct appeal, the Supreme Court decided *Batson* v. *Kentucky*, 476 U.S. 79,106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in which it stated that "[t]o the extent that anything in *Swain* v. *Alabama* is contrary to the principles we articulate today, that decision is overruled." *Batson*, 106 S.Ct. at 1725. Yet Miller-El contends that *Batson* only overruled one part of Swain. According to Miller-El, while under Batson, a defendant is no longer required to establish a prima facie case of racial discrimination based upon proof of historical, consistent, and systematic exclusion of African-Americans from juries, if racial discrimination is proffered, nevertheless, under Swain, then *either* the Swain or Batson evidentiary formulations apply. Miller-El argues that the evidentiary formulation of Swain is, thus, applicable to his claim of systematic exclusion. The government contends that the Batson evidentiary formulation overruled the Swain formulation on which Miller-El relies.

Under *Swain*, a defendant was required to show the prosecutor's "systematic use of peremptory challenges against Negroes over a period of time" as a predicate. *See Swain*, 85 S.Ct. at 839. Assuming that a defendant would be able to demonstrate a historical pattern of discrimination continuing unabated to the defendant's trial, the burden would then shift to the prosecutor to rebut the defendant's allegations. *See Alexander* v. *Louisiana*, 405 U.S. 625, 92 S.Ct. 1.221, 1226, 31 L.Ed.2d 536 (1972). To satisfy his burden, the prosecutor could do one of two things. First, the prosecutor could show that the systematic disparity resulted from racially-neutral selection procedures. Second, the prosecutor could "show neutral reasons for the striking of all the blacks in petitioner's trial itself." *Willis* v. *Zant*, 720 F.2d 1212, 1220-21 (11th Cir.1983). However, in any case under *Swain*, we have held that it is not sufficient to prove a *Swain* violation based solely on statistical evidence from

prior trials without some concomitant showing that the intentional and systematic discrimination continued "unabated" through to the petitioner's trial. *See Evans* v. *Cabana*, 821 F.2d 1065, 1068 (5th Cir.1987). Additionally, the prosecutor could rebut the petitioner's showing with a showing of neutral reasons. Miller-El argues that his showing under Swain requires only a showing of historical and systematic discrimination in order to establish a prima facie case.

In *Batson*, the Supreme Court, recognizing the "crippling burden of proof" which *Swain* created, replaced the Swain evidentiary formulation with the new *Batson* standard. That new standard involves the following three steps:

> First: A defendant can establish his prima facie case of purposeful discriminatory petit jury selection solely upon evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Alternatively, the defendant can make a prima facie case by proving historic, systematic discrimination;
>
> Second: If a defendant makes a prima facie showing, the burden then shifts to the government to provide a race-**[451]** neutral explanation for challenging the excluded jurors;
>
> Third: The trial court must then determine if the defendant has established purposeful discrimination, and the trial court's determination is a finding fact entitled to the applicable level of deference on appellate review.

See Batson, 106 S.Ct. at 1723-24.

Despite Miller-El's contention that the Swain evidentiary framework was untouched by Batson, the Supreme Court has itself explicitly stated "we reject [Swain's] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 1721; see also *Georgia v. 959 McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120

L.Ed.2d 33 (1992) (stating that "[i]n *Batson v. Kentucky*, [ ]the Court discarded *Swain's* evidentiary formulation").

With respect to the second step in the *Batson* analysis, the Court stated specifically:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's [race-neutral] explanation need not rise to the level justifying exercise of a challenge for cause.

Batson, 106 S.Ct. at 1723. Miller-El suggests that contrary to the above language in step two of the Batson evidentiary framework, the level of explanation required to rebut the prima facie case is governed by the rebuttal stage of the evidentiary formulation of Swain and is a "heavy burden." However, as we have noted, the Supreme Court has explicitly overruled the evidentiary formulation of Swain to the extent that it would contradict any principle, evidentiary or otherwise, announced in *Batson*. See id. at 1725. Thus, to the extent that the two burdens of rebuttal in Swain and Batson are inconsistent, the Supreme Court has mandated that the standard in *Batson* be applied. Here, *Batson* was decided during the pendency of Miller-El's direct appeal, and it is, thus, the applicable standard for analyzing his challenge to the use of peremptory juror strikes. *See Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that *Batson* governs claims by defendants whose appeals were pending and non-final at the time *Batson* was decided).

Miller-El contends that the state court's adjudication was an unreasonable application of *Batson* and that the court's findings were also unreasonable in light of his prima facie showing. His primary challenge is to the district court's alleged failure to give proper weight and credit to the evidence which he presented regarding the historical data evidencing exclusion of African-American jurors.

The state court findings in this case on the issue of discriminatory intent, despite Miller-El's protestations to the contrary, are entitled to great deference. *See Hernandez* v. *New York*, 500 U.S. 352, 111 S.Ct. 1859, 1868, 114, L.Ed.2d 395 (1991). As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. See 28 U.S.C. § 2254(e)(l).

The detailed factual findings made by the state trial court establish that each of the challenged African-American jurors **[452]** was stricken on race-neutral grounds. Miller-El has addressed the peremptory challenge of six of the ten *Batson* jurors in his request for a COA. We have now conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons proffered for their being excluded, we find that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary. The findings of the state court that there was no disparate questioning of the Batson jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record.

Having determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the de-

nial of a constitutional right. Accordingly, we deny Miller-El's request for a COA on this issue.

B.

Miller-El's second issue consists of two parts that revolve around his claim that he was incompetent to stand trial. He first claims that the state trial court erred in failing to provide him with a *sua sponte* evidentiary hearing pursuant to *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Second, he challenges his conviction as infirm under *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), on the basis that he was incompetent, in fact, at the time of his trial. Before analyzing these claims, a brief review of some additional facts is necessary.

Miller-El was tried some eight weeks following his arrest. Incident to his arrest, Miller-El was wounded by a gunshot. During the months following his arrest, Miller-El underwent surgical treatment for his injuries, and he experienced complications such as weight loss. On three separate occasions during his trial, Miller-El was evaluated by a doctor at the direction of the trial court. First, during jury selection, he experienced chest pains, chills, and a fever. He was diagnosed with pneumonia and was treated and discharged the same day. Nine days later, still during jury selection, Miller-El complained of delays in receiving medication. The trial court ordered a second evaluation to determine if Miller-El needed more medication. The doctor determined that he did not. Two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. During his trial, Miller-El complained of pain in his ribs and asked to see a doctor. And finally, on the evening of the day he was found guilty, the trial judge ordered a medical evaluation to determine if Miller-El would be able to sit through court after complaining of nausea and colostomy bag complications. He was kept overnight in the hospital and was released the next day when the punishment phase of his trial began.

Miller-El complains that he was denied a competency hearing at trial and that his due process rights were denied because whenever evidence raises a sufficient doubt about the mental capacity of the **[453]** accused to stand trial, a hearing is required. *See Drope* v. *Missouri*, 420 U.S. 162, 95 S.Ct. 896, 908, ,43 L.Ed.2d 103 (1975); *Pate*, 383 U.S. 375, 86 S.Ct. 836. Miller-El contends that the evidence raised a sufficient doubt as to his competency.

In *Carter* v. *Johnson*, 110 F.3d 1098 (5th Cir. 1997), we explained the procedural inquiries and burdens required for the two competency claims Miller-El asserts. Specifically, we summarized as follows:

The issue of competency may arise in two distinct contexts. *See United States* v. *Williams*, 81.9 F.2d 605, 607-09 (5th Cir. 1987); *Lokos* v. *Capps*, 625 F.2d 1258, 1261-62 (5th Cir. 1980). We must distinguish between them for purposes of the present case.

First, a habeas petitioner may allege that state procedures were inadequate to ensure that he was competent to stand trial. A trial court must conduct an inquiry into the defendant's mental capacity sua sponte if the evidence raises a bona fide doubt as to competency. *Pate* v. *Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). If the trial court receives evidence, viewed objectively, that should raise a reasonable doubt as to competency, yet fails to make further inquiry, this constitutes a denial of a fair trial. *See Lokos*, 625 F.2d at 1261.

If a *Pate* violation is established, the federal habeas court must consider whether a meaningful hearing can be held nunc pro tunc to determine retrospectively the petitioner's competency as of the time of trial. *Id.* at 1262. If so, the petitioner bears the burden of proving his incompetence by a preponderance of the evidence; if not, the habeas writ must issue, subject to retrial at the state's discretion. *Id.* This Pate procedural guarantee is not before us, having been expressly abandoned by Carter on appeal.

Second, a habeas petitioner may collaterally attack his state conviction by directly alleging incompetence at the

time of trial, thereby claiming a violation of the substantive right not to be tried and convicted while incompetent, rather than of the procedural guarantee of a competency hearing in the event that a bona fide doubt arises at trial as to competency:

> It is always open for the defendant to later assert his actual incompetence at trial in a subsequent collateral proceeding, but the substantive claim should not be confused with a defendant's procedural rights under *Pate* to a hearing whenever a bona fide doubt as to competence surfaces at trial.

Carter v. *Johnson*, 131 F.3d 452, 458 n. 10 (5th Cir. 1997).

First, with respect to whether Miller-El was entitled to a hearing, the relevant inquiry is whether the district court received information "which, if objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted [it] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261. In this case, the trial court specifically found that Miller-El was competent to stand trial, both at the trial and again on state habeas review. Specifically the court found:

> (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing **[454]** was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial."

Our independent review of the record evidence convinces us that the district court's finding that Miller-El was not entitled to a hearing is not unreasonable, and Miller-El has failed to present clear and convincing evidence to the contrary. With respect to whether Miller-El was, in fact, incompetent, we find that the district court's conclusion that he was not, is reasonable, and likewise, we find that the state

court's decision does not represent an unreasonable application of federal law. Thus, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right, and we deny Miller-El's request for a COA on this issue.

C.

In his third issue, Miller-El claims that he is entitled to a COA because the federal district court erred in refusing to conduct an evidentiary hearing nunc pro tune to determine whether he was competent to stand trial in 1986. Having concluded above that Miller-El has failed to establish a bona fide doubt as to his competency at trial under *Pate* and that the state court's determination of competence was reasonable, we need not readdress this issue.

A state court's competency determination is a finding of fact entitled to a presumption of correctness under § 2254(d)(2). And we have stated that "[b]efore the federal district court has a duty to investigate a habeas petitioner's claim of incompetency, the petitioner must show that there are sufficient facts to 'positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during trial.' " *Moody v. Johnson*, 139 F.3d 477, 481 (5th Cir. 1998) (quoting *Washington* v. *Johnson*, 90 F.3d 945, 950 (5th Cir. 1996)). Under Section 2254(e)(1), a habeas petitioner is entitled to a nunc pro tunc evidentiary hearing for the purpose of proving that he was incompetent at the time he stood trial only when he "makes a showing by clear and convincing evidence to raise a threshold doubt about his competency." *Lokos*, 625 F.2d at 1261. This threshold burden is "extremely heavy," *Johnson* v. *Estelle*, 704 F.2d 232, 238 (5th Cir. 1983), and requires that a petitioner present facts sufficient to "positively, unequivocally, and clearly generate a real, substantial and legitimate doubt" concerning his mental competence, *id.* at 238. *See also Jackson* v. *Anderson*, 112 F.3d 823 (5th Cir. 1997) (noting that § 2254(e)(1) places a heavier burden on petitioners seeking to rebut state court fact findings).

Miller-El suggests that he was entitled to an evidentiary hearing in the federal district court because he was not given a live hearing in the state court. The state habeas court instead based its decisions upon the parties' supplemental briefing and expert affidavits, i.e., Miller-El received only a paper hearing. We find Miller-El's suggestion untenable, especially where, as here, the trial judge and the state habeas judge were the same. *See Clark* v. *Johnson*, 202 F.3d at 766 ("we have repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims, especially where . . . the trial court and the state habeas court were one in the same.").

We conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right on this issue in that he has failed to rebut the presumptive **[455]** correctness of the state habeas and district court findings that he was competent to stand trial in 1986 and that he was not entitled to a nunc pro tunc hearing to determine competency. Accordingly, we deny Miller-El's request for a COA on this issue.

D.

In his fourth and final issue, Miller-El argues that he is entitled to a COA on his claim that his First and Fourteenth Amendment rights were violated by the admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple faith in violation of *Dawson* v. *Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). In *Dawson*, while the Supreme Court held that where religious affiliation unrelated to any issue in the case may be impermissible, there is no "per se" barrier to the admission of evidence which concerns a defendant's beliefs and associations at sentencing. *Dawson*, 112 S.Ct. at 1097. The Court noted that "[i]n many cases . . . associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* at 166, 112 S.Ct. 1093. We have, likewise, held that if the evidence regarding a defendant's affiliations or personal beliefs is sufficiently related to the issues involved, there is no constitutional violation. *See Boyle* v. *Johnson*, 93 F.3d 180, 183-84 (5th Cir. 1996).

Here the state habeas court concluded that Miller-El's association with the Moorish Science Temple was inextricably intertwined with his conviction and sentence. Evidence was entered in the guilt phase regarding his membership as part of testimony regarding witnesses' ability to identify him through his participation in the Moorish Temple Feast at the murder scene the week before the robbery-murder. Thus, introduction of this evidence during the guilt phase was relevant to other matters.

The additional references to his membership during the punishment phase of his trial, as the state court found, were appropriate as they related to his involvement with other group members who were heavily armed and who assisted in the commission of Miller-El's offense of conviction. The government's characterization of Miller-El as belonging to a heavily armed paramilitary group was supported by the evidence and was probative as an indicator of future dangerousness.

Having conducted an independent review, we conclude simply that the state court's determination that Miller-El's due process rights were not violated by the prosecution's reference to his membership in the Moorish Science Temple faith was consistent with and was not contrary to the Supreme Court's applicable holding in *Dawson*. Furthermore, we conclude that the state court's adjudication of this claim was reasonable, and therefore, we deny Miller-El's request for a COA on this issue.

I. CONCLUSION

Having carefully reviewed the record, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right with respect to any of the issues raised in his request for COA, and accordingly, we DENY his request for COA on all issues raised therein.

IN THE COURT OF CRIMINAL APPEALS,
SITTING AT AUSTIN, TEXAS

COURT CRIMINAL APP. NO. 69,677
TRIAL COURT NO. F85-78668-NL

THOMAS JOE MILLER-EL,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

[STAMP: FILED IN
Court of Criminal Appeals
APR 27 1987
Thomas Lowe, Clerk]

ORAL ARGUMENT REQUESTED

APPEALED FROM
CRIMINAL DISTRICT COURT NUMBER 5
OF DALLAS COUNTY, TEXAS

BRIEF FOR THE APPELLANT

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* * * *

[29] ARGUMENT AND AUTHORITIES

Article 35.16(c) of the Texas Code Of Criminal Procedure, provides that "A challenge for cause may be made by the defense for any of the following reasons:

> "2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor."

The Court Of Criminal Appeals has held that "... A defendant is entitled to have jurors who believe in the full range of punishment. *WOODKINS v. STATE*, 542 S.W.2d 855 (Tex.Cr.App.1976); Acc., *CUEVAS v. STATE*, 575 S.W.2d 543 (Tex.Cr.Appl.1978); *SMITH v. STATE*, 573 S.W.2d 763 (Tex.Cr.App.1977)." *PIERCE v. STATE*, 604 S.W.2d 185, 187 (1980). The law is clear that both the Appellant and the State have the right to have jurors who believe in the full range of punishment. *See HUFFMAN v. STATE*, 450 S.W.2d 858. In the instant case, Appellant contends that the Trial Court committed Reversible Error in Overruling his challenge for cause of venireman Nos. 6, DARYL L. WEIGANT; 21, SANDRA L. JENKINS; GWENDOLYN M. SMALE; 79, LOUIS G. WOLTERS; 82, CHERYL ANN DAVIS; 85, GARY B. SPENCE; 103, RUSSELL L. JONES; 107, MAX WAYNE O'DELL; and 108, SANDRA RAE HEARNE.

The overall picture presented by the voir dire examination each of the above named veniremen, who were challenged for cause by the Appellant and said challenges were overruled by the court were that each was a person holding strong convictions. Appellant was required to use a peremptory strike to excuse each of said veniremen except SANDRA RAE HEARNE. The **[30]** veniremen hereinabove referred to each expressed long held feelings with respect to the minimum range of punishment, in a murder case, feelings concerning the death penalty, that the fact that a person was in court, meant that he must have done something, otherwise he would not be there, prejudice against the testimony of psychiatrist, and giving more credibility to the testimony of a police office deprived this Appellant of those types of veniremen who could be impartial in this case. As a result of what each of the veniremen, hereinabove mentioned, stated, Appellant was forced to use peremptory chal-

lenges on each of said veniremen except 108, SANDRA RAE HEARNE. That the Appellant was wrongfully deprived of nine peremptory challenges by being forced to use these nine challenges on veniremen who were shown to be subject to a challenge for cause. That Appellant exhausted his peremptory challenges and thereafter venireman 108, SANDRA RAE HEARNE, who was objectionable to the Appellant, was seated as a juror. It was not necessary for Appellant to show in what manner MS. HEARNE was objectionable to him, nor to show that such juror was an unfair or partial juror, even though the record is clear from her testimony that she was obviously disqualified to sit as a juror in this case based upon her response to questions by counsel for Appellant. *WOLFE v. STATE*, 178 S.W.2d 274, 281.

Appellant alleges that the record in this case shows that each venireman complained of was challengable for cause; that **[31]** the overruling of such challenges and the use of peremptory challenges to excuse said veniremen deprived him of nine (9) peremptory challenges; and if all or some of the challenges for cause had been sustained, appellant would have had one or more peremptory challenges left and he would have used one to strike MS. HEARNE, for the reasons set out hereinabove. By no stretch of the imagination could MS. HEARNE be considered qualified as a fair juror in this case. That her background, associates, prejudices and opinions were of such a nature that a bias juror was seated on Appellant's jury. One who should have been struck without a challenge from Appellant but by the court, after examination by counsel for the parties. Appellant was entitled to jurors who had no bias or prejudice against any of the law applicable to the case upon which the defense was entitled to rely, either as a defense to some phase of the offense for which the Appellant is being prosecuted or a mitigation thereof or of the punishment therefor. Article 35.16, Texas Code of Criminal Procedure. *SHAVER v. STATE*, 280 S.W.2d 740; *HERNANDEZ v. STATE*, 563 S.W.2d 947 (Tex.Cr.App.1978). *See also PEYTON v. STATE*, 572 S.W.2d 677 (Tex.Cr.App.1978); *PIERCE v. STATE*, 604 S.W.2d 185 (Tex.Cr.App.1980). The nine (9) veniremen

struck and MS. HEARNE who was seated over Appellant's objections, because he had exhausted his peremptory challenges and the court's refusal to grant any additional challenges to Appellant, were all clearly disqualified based upon Article 35.16, Texas Code Of **[32]** Criminal Procedure, and appropriate case law of this court.

This court has held that "When a prospective juror is shown to be biased as a matter of law, he *must* be excused when challenged, even if he states that he can set his bias aside and provide a fair trial." *ANDERSON v. STATE*, 633 S.W.2d 851, 853-854 (Tex.Cr.App.1982).

Appellant was entitled, as a matter of law, to have the veniremen who were obviously disqualified by virtue of their examination by counsel, excluded from the jury upon a challenge for cause. Appellant made the appropriate challenges in the instant case, and they were denied by the court. Appellant was compelled to use peremptory challenges to excuse nine (9) of the ten (10) veniremen complained of hereinabove from sitting as jurors in this case. The tenth, MS. HEARNE, could not be excluded for the reasons hereinabove set out. This constituted reversible error by the trial court. *CHAMBERS v. STATE*, 568 S.W.2d 313 (Tex.Cr.App.); BODDE v. STATE, 568 S.W.2d 344 (Tex.Cr.App.); *JORDAN v. STATE*, 635 S.W.2d 522 (Tex.Cr.App.1982).

With respect to each of the veniremen set out above, except MS. HEARNE, Appellant submitted such juror for cause and the court overruled and declined to excuse such jurors for cause. Appellant was then required to use a peremptory challenge. With respect to MS. HEARNE, Appellant had exhausted his peremptory challenges, and after examination of MS. HEARNE by counsel, **[33]** submitted here for cause which was denied by the court. Appellant then advised the court that MS. HEARNE was objectionable to the Appellant and again renewed his request for additional peremptory challenges because of the court having failed to exclude the other veniremen mentioned hereinabove except MS. HEARNE. Therefore, Appellant preserved all error

pertaining to all of the veniremen mentioned hereinabove, as required by this court. *STEVENS V. STATE*, 671 S.W.2d 517 (Tex. Cr. App. 1984); *PHILLIPS V. STATE*, 701 S.W.2d 875 (Tex. Cr. App. 1985).

Because of the error complained of hereinabove, Appellant is entitled to have this cause reversed and remanded to the trial court below for a new trial or for the alternate for dismissal.

ASSIGNMENT OF ERROR NO. 18

The Trial Court materially erred in refusing to grant TIJUANA BEY BONNER transactional immunity after she invoked the Fifth Amendment to the United States Constitution.

ASSIGNMENT OF ERROR NO. 19

The Trial Court materially erred in refusing to grant SONNY KENNARD FLOWERS transactional immunity after he invoked the Fifth Amendment to the United States Constitution.

STATEMENTS AND REMARKS

The witness TIJUANA BEY BONNER was called as a witness by

* * * *

IN THE COURT OF CRIMINAL APPEALS,
SITTING AT AUSTIN, TEXAS

COURT OF APPEALS NO. 69,677
TRIAL COURT NO. F85-78668-NL

THOMAS JOE MILLER-EL,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

[STAMP: FILED IN
Court of Criminal Appeals
NOV 30 1992
Thomas Lowe, Clerk]

MOTION FOR LEAVE TO
FILE AND MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

* * * *

[13] the ten (10) Afro-American venirepersons excused by a Peremptory Challenge of the State, Appellant was denied a fair and impartial Trial composed of a Jury which was not touched or contaminated with the racial use of Peremptory Challenges by the State.

II.

The Court erred, in its Per Curiam Opinion, in holding that ". . .As to each respective claim, we find credible assertion of willingness to obey instructions of the Court with respect to all matters of law affecting Jury deliberations and to

consider the full range of punishment applicable to every potential offense in the case. *SEE APPENDIX B.* Consequently, Appellant has not persuaded us that the Trial Judge erred by rejecting his challenge to any specific veniremember. . .". *Miller-El, II, supra.* The Trial Court then Overruled Appellant's Points of Error Nos. 8 through 16.

ARGUMENT AND AUTHORITIES

Appellant contends that as a matter of law he was entitled to have Venirepersons WEIGANT, JENKINS, SMALE, NICKS, WALTERS, DAVIS, SPENCE, JONES, BODALE, and HEARN, each of whom were obviously disqualified by virtue of their examination by Appellant's Counsel, excluded upon Appellant's Challenge for Cause. Appellant seriously questions whether or not the "entire examination of the Venirepersons complained of" was made in rendering its decision **[14]** with respect to Points of Error Nos. 8 through 16, that is, whether or not the Venirepersons, ***"in a proper case could 'and would' assess the minimum sentence of five years for the lesser and included offense of Murder."***

Appellant made the appropriate Challenge for Cause with respect to the Venirepersons complained of and said Challenges were denied by the Trial Court, in each instance, and Appellant was required to exercise and use a Peremptory Challenge to excuse these ten (10) Venirepersons from being seated as jurors in this case. Appellant claims that besides the authorities set out in his original Brief, that this constitutes Reversible Error for the reasons set out in the following authorities. *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App. 1978; *Boddee v. State*, 568 S.W.2d 344 (Tex.Cr.App. 1978); *Jordan v. State*, 635 S.W.2d 522 (Tex.Cr.App. 1982). Appellant contends, based upon the entire Record and the examinations of the Venirepersons complained of by Appellant, that these persons were Venirepersons who would ultimately, if seated on the Jury, be guided by his/her personal beliefs rather than the law, and were, therefore, not qualified to sit as jurors in this case because of their feelings with respect to the minimum range of punishment. Appellant therefore alleges that the Trial Court, and this Court in affirming the Judgment of the Trial Court, materially erred in denying Appellant's Challenges for Cause to each of these Venirepersons. *See, Landry v. State*, 706 S.W.2d 105 (Tex.Cr.App. 1985).

[15] This is especially true with respect to Venireman SPENCE who testified that he presumed the Appellant had done something wrong by virtue of his being tried for Capital Murder. He never changed this statement. Thus, Appellant submits, that this Venireperson did not have an open mind, both as to the presumption of Appellant's innocence, and the minimum range of punishment. The Challenge for Cause should have been granted.

Appellant alleges that harm was created by the Trial Court's refusal to grant the Challenges for Cause to the ten (10) Venirepersons hereinabove complained of, and that in each instant, a Peremptory Challenge had to be used to exclude said person from being seated on the Jury in Appellant's case. *East v. State*, 702 S.W.2d 606 (Tex.Cr.App. 1985); *Bell v. State*, 724 S.W.2d 708, 795 (Tex.Cr.App. 1986). Appellant in this case exhausted all fifteen (15) of its Peremptory Challenges, ten (10) of said Peremptory Challenges being used to exclude Venirepersons WEIGANT, JENKINS, SMALE, NICKS, WALTERS, DAVIS, SPENCE, JONES, BODELL, and HEARN as jurors in this case. If the Challenges for Cause had been granted, as the Record clearly reflect they should have been, then Appellant would have had ten (10) Peremptory Challenges that he could have subsequently used to exclude other Venirepersons who were objectionable to Appellant. This is particularly true of Venirewoman No. 108, SANDRA R. HEARN. If ever -if ever - there was a Venireperson that should have been excluded for cause from the Jury in this case, or any capital Murder Jury, it was **[16]** Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs, who was seated as the twelfth person on the Jury in this case, over Appellant's Objections and Challenges for Cause. Appellant did not have any remaining Per-

emptory Challenges to use to exclude Venirewoman No. 108, SANDRA R. HEARN, who was truly an objectionable and unacceptable juror, from becoming the twelfth juror in Appellant's case. In fact, Appellant probably would have tried it with eleven, without MS. HEARN. Appellant therefore strongly asserts that severe and devastating harm can be clearly shown and established and is evidenced in the Record in this case in denying Appellant's Challenge for Cause to SANDRA HEARN. *See, Hernandez v. State*, 563 S.W.2d 947, 948 (Tex.Cr.App. 1978); *Wolfe v. State*, 147 Tex.Cr.R. 62, 178 S.W.2d 274, 281 (1944); *Salazar v. State*, 149 Tex.Cr.App. 260, 193 S.W.2d 211; *Bailess v. State*, 166 Tex.Cr.R. 478, 316 S.W.2d 743; *Sippert v. State*, Tex.Cr.App. 505 S.W.2d 866; *Cuevas v. State*, 575 S.W.2d 543 (Tex.Cr.App. 1978); *Smith v. State*, 573 S.W.2d 763 (Tex.Cr.App. 1977); *Pierce v. State*, 604 S.W.2d 185-187 (1980); *Williams v. State*, 622 S.W.2d 116 (Tex.Cr.App. 1981). That the Error complained of hereinabove, with respect to Venirewoman SANDRA R. HEARN, was compounded by the Trial Judge's refusal to grant Appellant additional Peremptory Challenges for the reasons stated in its Motion and because of the use of ten Peremptory Challenges against Venirepersons that should have been dismissed for cause. Appellant therefore avers that Reversible [17] Error was committed by the Trial Court in Overruling Appellant's Challenges for Cause and that harm was shown in the Instant Case and that this Court erred in affirming the Judgment of Conviction herein.

Appellant alleges that when examining the entire Record, it becomes abundantly clear that the Challenges for Cause complained of and denied by the Trial Court, constituted Reversible Error and Points of Error Nos. 8 through 16 should have been sustained. Appellant would respectfully request the Court to reexamine its remarks with respect to these Points of Error, and having done so, Reverse its prior Opinion thereto. If ever a Jury was stacked against an Appellant, it occurred in this case.

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III.

The Court, in its Per Curiam Opinion, erred in Overruling Appellant's 17th Point of Error that he ". . .did not demonstrate in Part II, ante, that he was forced to spend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to allow him more Peremptory Challenges was not improper.

ARGUMENT AND AUTHORITIES

Appellant realizes that the Code of Criminal Procedure provides 15 strikes for each side in a Capital Murder case. However, in the Instant Case, Appellant complained of ten (10)

* * * *

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NEWS

RACE BIAS PERVADES JURY SELECTION

Prosecutors routinely bar blacks, study finds Series: DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms
1986, The Dallas Morning News

Dallas County prosecutors routinely have excluded nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination on felony juries.

For four out of five black defendants, the selection process means that the constitutionally guaranteed impartial jury of their peers will be an all-white jury.

An eight-month investigation by The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges—legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race, although he acknowledged that race may be a factor in whom they dismiss. Prosecutors, Wade said, act within the spirit of the adversary legal system to exclude anyone if they believe it will give their client—the people of Dallas County—"a fair trial."

While blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that fewer than 4 percent of jurors were black. In fact, the chance of a qualified black serving on a jury was 1-in-10, compared to a 1-in-2 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 92 percent were barred by prosecutors. Blacks were excluded from juries at almost five times

the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion" of black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring their legal duty to uphold justice.

"I think that the black population, being a significant portion of Dallas County, is being totally discriminated against, and if I were a black person I'd be up in arms about it," said Dallas defense lawyer Kerry FitzGerald, head of the Texas Criminal Defense Lawyers Project Wade, Dallas County's chief prosecutor for 35 years, said that in some cases, he believes blacks may be "more likely" to convict defendants than those who actually are selected for juries.

"I'm frankly trying to get more on (juries)," Wade said of blacks. "We don't take them on just to balance the jury."

City Council member Al Lipscomb, an outspoken critic of jury selection in Dallas County, charged that prosecutors are using "racist tactics" that alienate blacks from the judicial system.

"The criminal justice system itself should be indicted here in Dallas for tampering with the law, for tampering with the rights of citizens," said Lipscomb, one of two black members on the City Council.

The U.S. Supreme Court has ruled that systematic exclusion of an identifiable group of potential jurors is unconstitutional. It has reversed criminal convictions on such grounds—including three cases from Dallas County in the 1940s in which racial bias in the selection of grand jurors was alleged.

FitzGerald contended that "stacking" the racial makeup of juries denies defendants of all races their constitutional

right to have their fates determined by a representative cross section of the community.

Increasingly, similar arguments are being voiced throughout the nation. Supreme courts in four states and three of the 11 federal circuit courts of appeal, for example, have modified peremptory challenges because of concern about their racially biased use by prosecutors.

In Texas, prosecutors and defense lawyers each have 10 peremptory challenges in non-capital felony trials. The peremptory challenge allows lawyers to cull prospective jurors without having to give cause.

The U.S. Supreme Court is studying the "cross section argument"—that defendants have a right to a trial by a representative section of the community—in a Kentucky case to decide whether to modify a controversial 1965 decision that permits racially based peremptory challenges in individual cases.

The court stated in *Swain* v. *Alabama* that a prosecutor's use of his peremptory challenges is not unconstitutional unless he uses them "in case after case" to exclude blacks for no reason related to any trial strategy.

Critics of Swain contend that it gives prosecutors free rein to exclude blacks and imposes an impossible burden on defendants to prove unconstitutional exclusion because of the lack of records identifying potential jurors by race.

Arch McColl, president of the Dallas County Criminal Bar Association, said The News' study exemplifies the type of race discrimination by state action that the high court consistently has condemned. It also demonstrates, McColl said, that prosecutors still adhere to jury selection guidelines suggested in a controversial 1969 paper.

The paper, written by then-Assistant District Attorney Jon Sparling, noted that minorities "almost always empathize with the accused" and therefore do not make good jurors for the prosecution.

"You are not looking for a fair juror," Sparling advised in the paper, which later was made part of a manual for

Texas prosecutors, "but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree."

Sparling, now a candidate for the Republican nomination for district attorney, said he was repeating "the conventional wisdom of the time" and that he no longer believes the guidelines are valid.

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks" Sparling said.

State District Judge Larry Baraka, a former prosecutor and the county's first black felony court judge, said The News' findings also demonstrate the failure of judges and defense lawyers to stop the exclusion of qualified blacks from jury service.

"I'm in shock," Baraka said. "I thought things had gotten a lot better, but apparently they haven't."

Wade said his assistants are trained to use their peremptory challenges to dismiss potential jurors they believe will empathize with the defendant. He said, however, that not all his assistants may use their peremptory challenges intelligently.

"You're trying to get either a completely unbiased juror or one that may be biased in favor of the state," said Wade, who is not seeking re-election. "And I suspect a lot of those (blacks) being cut would probably be better jurors than the ones they end up with."

Wade suggested that the high rate of black exclusion revealed in The News' study might stem from a disproportionately large number of blacks who express doubt about assessing maximum punishments or who have personal knowledge of criminal cases.

Wade said he was not convinced by The News' findings that his assistants engage in an illegal, systematic exclusion of blacks. "It indicates, maybe, that," he said.

The News' study is based on a computer analysis of Dallas County court records from 100 felony jury trials con-

ducted during 1983 and 1984. The trials were selected at random from among the 1,036 trials held during that period.

The study examined records on 4,434 prospective jurors to determine the racial composition of juries, as well as the race of persons excluded from jury service by judges, prosecutors and defense lawyers.

Among the major findings of the study are:

- Juries in 72 of the 100 trials had no blacks. Of the 28 juries with black members, eight sat in judgment of black defendants while 20 decided the fate of Anglo and Hispanic defendants.
- Only two of 54 black male defendants included in the study were tried by juries that had black males. None of the seven male Hispanic defendants had a male Hispanic juror. All 38 Anglo defendants had a majority of Anglos on their juries.
- Of those blacks eliminated from jury service by peremptory challenges, 92 percent were struck by prosecutors. Four percent were excluded by defense lawyers, and 4 percent were dismissed by both sides. (Neither side knows the other's challenges until the judge receives them at the end of the preliminary examination.)
- Forty-seven Hispanics and 46 blacks served on juries, although the number of blacks summoned for jury duty was five times greater than the number of Hispanics.
- The percentage of blacks disqualified from jury service by judges was 1 1/2 times the percentage of disqualified Anglo or Hispanic jury candidates. However, blacks were excluded by prosecutors at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Prosecutors maintain that blacks themselves are partly responsible for their under representation on felony juries because many disqualify themselves by saying they cannot

judge others or consider a life sentence in cases where state law provides such punishment upon conviction.

Under Texas law, prospective jurors who say they cannot follow the law because of personal convictions or bias are disqualified for "cause."

After those disqualified are dismissed by the judge and both sides exercise their peremptory challenges, the first 12 people who remain are chosen to sit on the jury.

Peremptory challenges, in varying forms, have existed since the 13th century in English law. Historically, they were granted only to the defense in a criminal case. It has been in the last century in the United States that prosecutors were granted the right to exercise such challenges.

Defense lawyers argue that the use of peremptory challenges by Dallas County prosecutors to exclude blacks from juries stems from a racial stereotype that blacks are less inclined to convict and assess harsh penalties.

The stereotype has been passed from generation to generation of prosecutors and is particularly acute in Wade's office, defense lawyers say, because of its heavy emphasis on conviction rates as the means for earning promotion.

"You don't get hired unless you can play that game, and you certainly don't progress," said Vincent Perini, president of the Dallas Bar Association.

"What they are, really, is a bunch of SMU frat rats who are, you know, putting in a little postgraduate work down there kicking nigger ass before going on to the real world, the respectable world, the Dallas Country Club and the civil law firm," Perini said.

Norman Kinne, one of Wade's top three felony prosecutors and a member of his staff for 14 years, strongly denied Perini's characterization of the district attorney's staff.

"I can't believe the elected president of the Dallas Bar Association, in one fell swoop, manages to insult Southern Methodist University, fraternities, the black race, the Dallas Country Club and all civil law firms," Kinne said.

"However, we have tried over the years to provide, under Mr. Wade's guidance, professional prosecution of which all citizens may be proud. The record of this office and the quality of life in Dallas speaks for itself."

Baraka said stereotyping blacks as being less inclined to convict and assess tough sentences is "absurd."

"Skin color has nothing to do with the process of your damn brain," he said.

Defense lawyers say the practice of excluding blacks has diminished as the number of black prosecutors in Wade's office has increased, but they say that even black prosecutors succumb to the pressure to win at all costs. Eight of the 42 felony court prosecutors on Wade's staff are black.

Black lawyers, in particular, maintain that blacks, more than whites, have more reason to dislike criminals because of the higher crime rate in the black community.

"People, be they black, white or brown, are tired of crime; they're just tired of it," said Royce West, a black former prosecutor and a Democratic candidate for district attorney. "I think that when blacks and browns are systematically included on juries that they will give stiffer punishments."

Added defense lawyer Frank Hernandez: "Blacks, Mexican-Americans, women are just as tough, if not tougher, on a defendant who meets their minority status because they look upon that person with some sort of anger sometimes: "You are causing our whole group to be looked upon in this (bad) way."

"Just because you're black doesn't mean that if the defendant is black he gets away," said Hernandez. "Blacks don't like to be shot at in 7-Elevens any more than anybody else. Nor do Hispanics like to be burglarized."

The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.

In The News' study, only 3.3 percent of the peremptory challenges exercised by defense lawyers were against blacks; 2.5 percent were against Hispanics. Ninety-four percent of the defense strikes were exercised against Anglos.

Dallas County Public Defender Ralph Taite said he routinely warns black clients that they will likely face "a white jury composed of housewives, sometimes rednecks, a lot of middle-class people who come from the suburbs, who have very little contact with them."

"There's not going to be anybody on that panel who's going to be able to say, "Yeah, that's the way it is over in South Oak Cliff, or South Dallas, or West Dallas," Taite said.

The only time blacks get on a jury, defense lawyers contend, is when there are too many white non-conformists who appear to prosecutors to be even worse risks.

"You get about 12 hippies and 14 painted-up women and a bunch of cab drivers and bartenders, and they (prosecutors) will be inclined to take chamber of commerce-type blacks—you know, business-looking, good background with jobs," said veteran defense lawyer Charles Tessmer.

Defense attorney Richard Aguire said The News' findings that Hispanics serve on juries in a greater proportion than blacks confirms observations that prosecutors prefer Hispanics over black jurors.

The reason, Aguire said, is that prosecutors believe Hispanics will follow the lead of the Anglo majority on a jury. According to defense lawyers, prosecutors also believe that Hispanics will not favor black defendants because of what prosecutors perceive as historical antipathy.

Members of the judicial system argue the impact that exclusions of minorities have on sentencing, but many agree that the practice has a wide-ranging impact on the appearance of justice in Dallas County.

The threat of an all-white jury prompts some black defendants to waive their right to a trial and seek a plea bargain, lawyers say; other defendants change their pleas after learning that their jury contains no member of their race.

"Black people don't like to go to trial, regardless . . . They don't believe they're going to get a fair trial from white people," explained defense lawyer Carl Gaines, the second black prosecutor hired by Wade.

Nor does the impact of black exclusion stop with defendants. Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind.

Many families of defendants leave the courtroom believing they have witnessed "white man's justice," said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.

"I think that hurts the judicial system because then they're not concentrating on the fact that Johnny is a no-good scumbag who beat up this old lady, stole her purse, put her in the hospital and nearly killed her," Lesser said. "They're concentrating on the fact that, well, it's racist."

Jessica Guillory was one of nine black potential jurors summoned in February for a case involving a black woman charged with welfare fraud. Mrs. Guillory said she felt intimidated after watching the panel reduced to an all-white jury.

"It made me know that I better not ever get in trouble, that I don't feel like justice is all it's supposed to be," said Mrs. Guillory, one of six blacks dismissed by the state.

Baraka said blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility.

"As a defendant, we don't stand a chance. We're arrested more often, we're convicted more often, we receive more punishment. I mean, those are just the facts," Baraka said. "And as honest, law-abiding citizens who believe in God and the American way and pay taxes to send our children to school, we're still told we're not anything of value."

West, a defense attorney, said that even black professionals contemplate ignoring a jury summons, believing that because of their race, their opinions are not wanted by the

justice system. "There's no sense going down there (to the courthouse) because they're going to strike them just because they are black," West said.

Still other blacks have a more visceral reason for avoiding jury service, according to state District Judge Ed Kinkeade, who oversees operation of the central jury pool.

"They tell me, "I'm afraid of the courthouse; nothing good happens at the courthouse, and I don't want to be a part of it," Kinkeade said.

Racial discrimination in jury selection in Dallas County dates back at least to the 1930s when riots narrowly were averted after blacks appeared at the courthouse, insisting they be considered for jury service. In 1938, a black college president was thrown head-first down the courthouse steps by two white men when he refused to leave the central jury room.

In the 1940s, the U.S. Supreme Court, in three separate cases, told Dallas County that its method of selecting grand jurors was unconstitutional because it intentionally excluded blacks.

Evidence presented to the Supreme Court in one Dallas case in 1942 showed that no black ever had served on the Dallas County grand jury. Two grand jury selection officials said they had not summoned any blacks because they knew of no qualified black in the county, which then had 55,000 black residents.

The law was then the most common form of exclusion. Most blacks were simply disqualified from jury service because, in order to be an eligible juror, a person must have paid a poll tax—a required fee for voting—and be a property owner.

Blacks who did qualify for jury service in Dallas County were rarely served with summonses; those who were served and appeared at the courthouse frequently were told by judges that their services were not needed.

Not until 1949 did a black serve on a trial jury in Dallas County, 81 years after blacks were granted full rights as citizens by the 14th Amendment to the U.S. Constitution.

When Wade took office as district attorney in January 1951, he said, he made it a priority of his office to prosecute more crimes against blacks, because of the higher crime rate in predominantly black neighborhoods. That policy has remained a priority ever since, Wade said.

However, Wade said he has never had a policy of preventing blacks from serving on juries and has seated blacks on juries as far back as the 1950s.

But state District Judge Jack Hampton, who served on Wade's staff from 1958 to 1962, recalled being reprimanded by Wade when he allowed a black woman to serve as a juror on a misdemeanor drunken driving case. The case ultimately ended in a mistrial because the woman could not reach a verdict.

"If you ever put another nigger on a jury, you're fired," Hampton quoted Wade as saying. "That was the way things were back in 1958."

Said Wade: "That didn't happen, so far as I'm concerned."

Hampton said he did not put another black on a jury for the remainder of his career as a prosecutor.

Five years later, a treatise on jury selection credited to Assistant District Attorney Bill Alexander, then one of Wade's top aides, reiterated the belief that certain minorities were not appropriate state's jurors.

"Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated," Alexander advised prosecutors. "I may like these people, but they will not do on juries."

Alexander, now a federal prosecutor in Dallas, said he accepted blacks as jurors when he was in Wade's office and does not remember writing the treatise that advised against selecting minorities. "I just won't take responsibility for that," he said.

In 1963, when the treatise appeared, the number of blacks appearing for jury duty remained small. But by the end of the decade, that number was increased significantly with the abolition of the state poll tax in 1966 and the advent of a new law designating voter registration lists as the source lists for juries.

It was then, according to defense lawyers, that prosecutors began in earnest to exercise their peremptory challenges against blacks.

In 1969, Sparling, then an assistant district attorney, delivered what became a highly publicized speech to a training session for prosecutors. Sparling's suggestions on jury selection, in fact, were the subject of a Time article in 1973 that carried the headline: "Women, Gimps, Blacks, Hippies Need Not Apply."

In addition to minorities, Sparling's recommendations warned against selecting "free-thinkers" people with physical afflictions and the overweight—especially women and young men.

Wade and his assistants maintain the Sparling manual never was followed blindly and never has been read by most current prosecutors. They insist that prosecutors are trained to 711 make individual decisions on jurors based on a combination of demographic factors and personal observations.

"Why do I want 12 white people on a jury when one of them is a person who's been unemployed for a while or not much of a work record, and came to court without a coat and tie, and you struck this young black business executive just because he was black?" said Jerry Banks, formerly one of Wade's top assistants. "That's dumb."

Any prosecutor who allowed his racial prejudices to interfere with his judgment in selecting the best possible jury, Banks said, would not have lasted long in Wade's office.

Defense lawyers claim that prosecutors with the least experience are the most likely to rely on stereotypes handed down by more experienced prosecutors.

"If Douglas MacArthur wrote his memoirs on the campaign in the South Pacific and you wanted to be a great general, what would you do?" asked Aguire, a former prosecutor. "If you're an inexperienced prosecutor, you do what the old master says."

The process of culling black jury candidates is apparent almost every Monday in the Dallas County Courthouse. Dozens of blacks, along with other potential jurors, enter the central jury room and later are sent to a felony court for jury questioning. But when the jury is seated, blacks more often than not are left sitting in the audience.

Inside the courtroom, prosecutors commonly exercise peremptory challenges against blacks who voice similar views and appear to possess similar qualifications to whites who are selected on the jury.

The News witnessed prosecutors repeatedly dismissing black professionals in favor of blue-collar whites, even though the whites may not have lived in the county as long. The practice was particularly pronounced when the defendant was black.

Selecting a jury, lawyers agree, is part gamesmanship and part psychology, with each sides attempting to guess how the other will use its 10 peremptory challenges to sculpt a jury of people most inclined to favor its side of the case.

And while the intent behind the law allowing peremptory challenges is to obtain an impartial jury by eliminating signs of partiality, lawyers on both sides scoff at the notion that fairness motivates their use of the challenges.

"Anybody who tries to sugar-coat it by talking about fairness and justice and equality is just talking through his hat," said defense lawyer Mel Bruder. "We want people who are going to look at that case with prejudiced eyes."

The means of identifying potentially hostile jurors can be as straightforward as listening to candidates' responses to questions, or as subtle as observing the quickness of the person's gait or the style of his hair.

Stereotypes, superstitions and instincts are integral parts of the selection process, lawyers admit, because of the limited time available to question potential jurors and the sparse biographical information provided on each candidate.

Opinions on whom to exclude are not scientific.

Alexander, one of Wade's former top assistants, for example, promulgated a policy that came to be dubbed "The Alexander Rule." It advised prosecutors to exclude any person whose profession begins with the letter "p"—including plumbers, painters, prostitutes and pimps. Alexander also advised against selecting "Yankees . . . unless they appear to have common sense," "queers" and "anyone who has ever lived in California."

Defense lawyer Tom McCorkle, a native of Highland Park, said he habitually uses peremptory challenges on persons belonging to any group "I loathe."

"Republicans and people from the Park Cities, my own flesh and blood, you know, I wouldn't have on a jury," McCorkle said. "I'm prejudiced about that, have bad feelings about them."

Other defense lawyers say they routinely use their peremptory challenges to exclude police officers, retired military personnel, bankers and Lutherans, all of whom traditionally are viewed as prosecution-oriented. They say they look for open-minded people and "virgin jurors" untainted by exposure to the judicial system.

Prosecutors, on the other hand, say they look for conservative people with a stake in the community. Indicators of stability, they say, are a person's job, his family makeup and his personal appearance.

The current instructional manual given prosecutors by the Texas District and County Attorneys Association suggests that it is not advisable to select potential jurors with multiple gold chains around their necks or those who appear to be "free thinkers."

What distinguishes defense practices from prosecution practices, according to defense lawyers, is that prosecutors

use their legally constituted peremptory challenges to accomplish an illegal result—the disenfranchisement of blacks from jury service and the perversion of the guarantee of a jury of peers.

The result, they maintain, is that justice is skewed because an entire segment of the community is prevented from voicing its opinions on what constitutes justice in any individual criminal case.

The absence of blacks, lawyers say, deprives juries of a variety of perspectives and insight into human behavior, sometimes forcing white jurors to rely on stereotypes and biases in determining the fate of defendants.

"They are incapable of empathizing and unlikely to sympathize," defense lawyer Tim Banner said of all-white juries. "They haven't lived inside a black skin. They don't know what it's like."

The racial composition of a jury can be particularly critical in cases in which the state's evidence is primarily circumstantial, such as the identification of eyewitnesses.

Defense attorney Ed Sigel represented E-Systems engineer Lenell Geter in a celebrated armed robbery case that raised the specter of racial prejudice in the Dallas County's justice system. Sigel contended that white witnesses had more credibility with Geter's all-white jury than Geter, a black.

Every black eligible to serve on Geter's jury was dismissed by prosecutors, Sigel said.

"What they thought was, Geter was just another black young fellow that was out robbing," Sigel said. "There's no question in my mind that if he were a white engineer, they would not have dealt so harshly with him and they probably would not have found him guilty. They would have listened to the evidence."

Geter was found guilty of armed robbery and sentenced to life in prison. However, he was released after the district attorney's office agreed to give him a new trial, based on allegations of irregularities in his trial. Ultimately, all charges

against Geter were dropped, after eyewitnesses identified another black man as the robber.

Racial makeup also can affect the tone of deliberations.

Defense lawyer Ron Goranson recalled a recent trial in which he defended a black man accused of murder, and overheard one member of the all-white jury discussing potential punishment for his client.

"Look, I already agreed with you not to find the nigger guilty of murder," Goranson quoted the man as telling his fellow jurors, "but I'm not going to let you talk me into giving him probation."

Opinions about the effects of a jury's racial composition on the verdict rendered are almost as varied as the opinion-givers. Some defense lawyers contend all-white juries tend to punish black defendants more severely; some say white juries are not as tough, particularly in crimes among blacks.

Most judges say juries, regardless of the racial makeup, almost always "do the right thing."

Texas criminal case law shows that few cases have raised the issue of race-biased jury selection on appeal. In cases that have raised the issue, state appeals courts did not find reversible legal error. Those cases that have been overturned have been reversed by federal appeals courts.

Trial court judges acknowledge that the practice of prosecutors excluding blacks is common, but they contend that they have no authority to interfere with the exercise of peremptory challenges.

"A judge has no role in directing the prosecutor or the defense lawyer to do their peremptory challenges, or not do their peremptory challenges, in a particular manner," state District Judge Richard Mays.

Kinkeade and Baraka, however, said judges can prevent systematic exclusion through informal means by telling prosecutors they will not tolerate such behavior.

Last year, for example, Baraka barred one prosecutor from selecting juries in his court, he said, when the lawyer

did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, The News observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks from the jury panel.

"This is not due process, it is not constitutional, it is against God," Stauffer said after the trial.

No lawyer representing a black defendant questioned potential jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit his bigotry.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day," said defense lawyer Richard Corbitt. "I think it's malpractice."

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

"It goes back to the old, old quote out of the (Texas) Court of Criminal Appeals. He may strike as many blows as he wants but they must be fair blows," said Bruder, a Dallas defense attorney.

"And if all he (the prosecutor) is doing is striking blows for the state by excludo I don't think are going to do a good job for my client—I'm in a hard position to criticize him for it," Bruder said.

Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?"

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . . It wasn't until *Brown* v. *Board of Education* that the courts decided everybody had a right to an equal education," Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time."

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

1-2 CHARTS (Credit: The Dallas Morning News Source: Based on a News analysis of 4,434 prospective jurors called for potential service in 100 felony trials in 1983-84. The 100 trials were chosen randomly.) 1. HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE RACIAL MAKEUP OF DALLAS COUNTY TRIAL JURIES **PHOTOS** 1. Jon Sparling (No credit given) 2. Larry Baraka (No credit given) 3. District Attorney Henry Wade denies that his assistants use race as the sole factor in excluding people from juries. (Credit: The Dallas Morning News) 4. Robbery charges against Lenell Geter were dropped in 1984 after he served 16 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial. (Credit: The Dallas Morning News/David Woo).

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NEWS

A PATTERN OF EXCLUSION Blacks rejected from juries in capital cases

Series:

DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle

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For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 57 other blacks legally qualified to serve on the juries, but prosecutors barred 56.

The prosecutors' use of peremptory challenges—dismissing potential jurors without having to give a reason—meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal cliches."

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those, in fact, Larry Smith and Michael Wayne Evans, were executed by lethal injection this year after twice being tried and convicted by all-white juries.

The only black allowed to pass judgment against another black was one who told prosecutors that Texas' form of execution—lethal injection—was too humane. "It's too quick," he testified. "They don't feel the pain."

These are among the findings of an ongoing investigation by The Dallas Morning News examining jury selection in Dallas and 14 other Texas counties. The analysis included a review of the records of 133 of 232 inmates on death row as of Aug. 1.

The 15 counties, which accounted for almost 60 percent of inmates on death row, represented major geographic regions and included the five largest metropolitan areas in the state. In counties whose black population amounted to at least 10 percent, the investigation also found evidence of racial discrimination in jury selection.

In Dallas County capital murder cases since 1980, blacks had a 1-in-12 chance of being selected as jurors, compared to a 1-in-3 chance for whites and a 1-in-4 chance for Hispanics.

Capital cases, which carry mandatory life sentences or the death penalty, are limited to murders of law enforcement officers or slayings committed in the course of certain other felonies, including robbery, rape and kidnapping.

Several legal experts and community leaders say the findings show that peremptory challenges are being used by prosecutors as tools of discrimination against defendants facing the most visceral decision of criminal justice—execution.

Frank Williams, criminologist with the Criminal Justice Center at Sam Houston State University in Huntsville, analyzed The News' findings. The probability that blacks were eliminated by chance is "1-in-10,000," he said.

State District Judge Larry Baraka, Dallas' first black felony prosecutor, said The News' findings reaffirm his conclusion that race is the primary reason prosecutors use peremptory challenges to bar blacks.

"Knowing Dallas County and knowing the DAs' practices, I know that's what they're doing."

Jack Boger, assistant counsel for the NAACP Legal Defense Fund, said the findings establish a pattern:

"The minority community is being told that it doesn't count as much in the criminal justice system. . . . They certainly don't count as jurors and they're being told they need

not apply, or if they apply, they will not be, in effect, hired as jurors."

In a series of articles published last March, The News documented virtually the same pattern of discrimination in 100 randomly selected felony trials in Dallas County.

In April, a landmark U.S. Supreme Court decision, *Batson . Kentucky*, prohibited the use of peremptory challenges in a racially discriminatory manner, saying such practices undermined "public confidence of our system of justice." In a concurring opinion, Supreme Court Justice Thurgood Marshall cited The News' findings as an example of "systematic exclusion" that violated the 14th Amendment guarantee of due process under the law.

Henry Wade, Dallas County's district attorney for 36 years, said he did not know the specific reasons his prosecutors excluded blacks in capital cases. Wade speculated these blacks were not seated as jurors because prosecutors believed them to be sympathetic toward defendants.

Wade said his office has tried to impanel more blacks on juries in the past five to 10 years. "But I don't believe in putting someone on there just because he's black," Wade said. "I want someone on there who's going to vote for the state."

Assistant District Attorney Norman Kinne, who has tried 11 capital cases, more than any other prosecutor on Wade's staff, suggested that most blacks were excluded because they expressed reservations about the death penalty.

Kinne said prosecutors have not intentionally selected all-white juries. "It's just the way things fell," he said.

While The News' analysis revealed a pattern of prosecutors barring blacks, blacks themselves also shoulder some of the responsibility for the prevalence of all-white juries in capital cases.

Potential jurors in capital cases are screened individually by both prosecutors and defense attorneys. If during the questioning, they state they cannot be impartial, the judge dismisses them for "cause." After screening, each side

has 15 peremptory strikes that allows it to cut potential jurors without explanation. The first 12 remaining are impaneled as jurors.

In Dallas County, blacks are three times more likely than whites to be excused for cause after saying they cannot assess the death penalty, The News' inquiry showed.

In Harris County, only 8 percent of the jurors in capital cases were black. But blacks there were more likely to hear the cases of other blacks; 65 percent of black defendants had at least one peer on his jury, by far the highest percentage among the 15 counties examined by The News.

Almost 80 percent of the black inmates on death row from the remaining 14 counties faced all-white juries.

"Never in the history of the state of Texas has a white person been sent to death by an all-black jury," said Harris County Justice of the Peace Al Green, president-elect of the Houston branch of the NAACP. "It has never been done. . . . . Somehow we've come to accept the notion that it's all right for a black defendant to be put to death by an all-white jury."

John Fearance and Ronald Curtis "Buffalo" Chambers are two of the three surviving black inmates on death row from Dallas County. Counting retrials, both have been tried and convicted twice by all-white juries.

"There's no justice to it," Fearance said from behind a heavy mesh screen at the Texas Department of Correction's Ellis I Unit near Huntsville. Fearance was convicted of the 1978 stabbing death of an East Dallas man while burglarizing his house.

"They have their mind made up," he said. "They've already tried you before they've actually tried you."

Chambers, on death row for the 1975 slaying of a Texas Tech University student during an abduction-robbery, said prosecutors didn't want to take a chance at justice.

"You're sitting there and you start seeing only white people going on the jury, right? Well if you're a black dude, and you see all these white people that are going to be on

your jury—the judge, too—you want somebody who can under stand you."

Houston lawyer Percy Foreman has, by his own estimation, tried more death penalty cases than anyone. He believes that, given the same evidence, a black is more likely to be sentenced to death than a white.

The reason, Foreman asserts: "Racial prejudice on the part of the jurors."

Beaumont lawyer Gaylyn Leon Cooper, the first black felony prosecutor in Jefferson County, believes black jurors mitigate racist impulses.

The black juror won't go in and say, "'Well, you know how these people are,' or 'I'm afraid of these people,'" Cooper said.

Minority representation on capital murder juries also is seen as a way to ensure that mitigating circumstances are at least considered.

"If you're in a death penalty case and you've got a black kid who grew up . . . in the ghetto, and was fatherless, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client," said Dennis Boskey, former legal director of Southern Poverty Law Center in Montgomery, Ala.

State Sen. Craig Washington, a Houston defense lawyer, said the secret deliberations of 12 white jurors sends a negative message to the minority community.

"If I'm outside the door when the decisions are being made, I'm suspicious of the decision," Washington said. "If you're being fundamentally fair and your decision is right, then you shouldn't mind me watching it being made."

The Re. Zan Holmes, pastor of Dallas' St. Luke Community Methodist Church and a former Texas legislator, said blacks more often are crime victims than whites. "Blacks have a lot at stake in the criminal justice system and want to see justice done."

For more than 20 years, the same U.S. Supreme Court decision that condemned the use of peremptory challenges "to deny the Negro the same right to participate in the administration of justice," in practice gave prosecutors free rein.

Defense lawyers complained that Swain v. Alabama demanded an unattainable standard of proof; the ruling permitted the use of peremptory challenges in individual cases, and required documentation of system-wide discrimination.

But under the guidelines of the Batson decision in April, if a defense lawyer shows evidence of "purposeful racial discrimination" during a single trial, prosecutors can be compelled to prove they didn't use their peremptory challenges solely to exclude blacks.

The debate now centers on the application of Batson in actual courtroom situations. Prosecutors say it contradicts the traditional intent, which allowed a person to be excused without explanation.

Defense attorneys contend the ruling can easily be circumvented.

"A lot of time is going to be wasted because the prosecutor can always come up with some other reason that would appear equally valid," explained Houston lawyer Donald W. Rogers Jr.

There is a wide gap between knowing peremptory challenges are being used racially and proving it, according to John Paul Davis, Jefferson County's first black prosecutor and now a municipal judge in Beaumont.

"The subtleties of discrimination within the criminal justice system are the most dangerous kind of discrimination, because it is often times camouflaged with legal cliches," he said. "Lawyers can always use one word when they want to use another."

However many lawyers believe Batson can be used to curb prosecutors' use of peremptories along racial lines.

"A good, articulate prosecutor who actually chooses (jurors) on methods other than race will have no problem with Batson," said Dallas lawyer Richard Alan Anderson. "If you've got a prosecutor who's obviously choosing on a racial basis and is just trying to make excuses to justify that ... then you're going to catch those folks."

University of Iowa law professor David C. Baldus, a nationally known expert in capital murder trials, suggests that lessons learned in job discrimination suits might be applied to jury selection.

In those cases, employers have been found liable for rejecting minority job applicants whose lawyers proved they had the same characteristics as whites who were hired.

Prosecutors who have been successful after picking all—white juries are not likely to change their formula. And that formula, many defense lawyers claim, was etched in an era of segregation and passed blindly to a new, more enlightened generation that nevertheless is practicing age-old discrimination.

"The practice that's been going on in that courthouse ever since I've been involved in it—as both a prosecutor and a defense attorney—is that you just don't question success," said Brad Lollar, president-elect of the Dallas County Criminal Bar. "They've been picking their juries that way forever . . . and it's always worked."

Lollar, a Dallas County prosecutor for four years before going into private practice, said no one "necessarily . . . came up to me and said directly, "Don't take a black on a jury." It wasn't that obvious.

"What we were told to do was go around and watch how the experienced prosecutors did things. And it didn't take a Rhodes scholar to figure out that one thing they were all doing was excluding minorities from the jury."

For Houston lawyer James Stafford, who has appealed the selection of an all—white jury in a capital murder case, the irony is that many blacks eliminated are "probably a lot stronger state's jurors than some of the white people."

While The News' study showed a higher percentage of blacks on Harris County capital murder juries than on Dallas juries—8 percent versus 3 percent—prosecutors there nonetheless used peremptory challenges to strike more than 90 percent of the black potential jurors.

Harris County District Attorney Johnny Holmes said his prosecutors do not use peremptory challenges solely because of race, but added: "I don't know if we can divorce race from individual philosophies of the potential juror."

Holmes argues that many blacks perceive the judicial system still tainted by historical experiences of racial prejudice and injustice.

"I still get a rap sheet every now and then on a black defendant and somewhere earlier in his arrest career, it shows "black man walking in a white neighborhood." Now, when you have been subjected to that, or you know people who have, or your family members have . . . it makes one a little bit skeptical of the system."

And that skepticism, Holmes said, might be reflected in "some type of turn-the-other-cheek punishment" for a capital murder defendant.

Houston lawyer Carolyn Garcia, who has handled the appeals of several death row inmates, disagrees. She points out that blacks who are removed with peremptory challenges already have sworn they can follow the law. And she fears that the exclusion of blacks from juries is creating yet another disenfranchised generation.

"You can never get off the treadmill of negative experiences," she said. "The only way to break that cycle is to invite those people into that system."

Dennis Boskey, a Montgomery, Ala., lawyer who specialized in capital murder cases, described Holmes, position as a form of double jeopardy.

"You're saying, 'Well, we beat you over the head then and now we're going to kick you off the juries because we beat you back then'" Boskey said.

The search for the ideal juror frequently leads prosecutors and defense lawyers along different routes. They look at a disparate assortment of intangibles to guide them, from how a potential juror looks and how much money he makes to the kinds of books he reads.

"You want a guy with roots in the community," explained Kinne, who teaches other Dallas County prosecutors how to select juries in capital murder cases. "Usually he has some sort of responsible position that he's held for a number of years. None of his close family or friends has been involved in crime or spent time in the penitentiary. He has a basic understanding of the law . . . and doesn't have any disagreement with any of the law."

Dallas defense attorney Mike Byck, who defended Chambers and two others on capital murder charges, says each side has its own criteria for jurors.

"The district attorneys want a bunch of jack-booted, marching fascists to sit on a capital murder jury," Byck said. "I want a bunch of yuppie, knee-jerk, no-backbone liberals to sit on my jury because I don't want them to kill my man. They want them to kill the guy."

Jurors on Texas capital cases once were required to swear that the potential outcome—either death or life imprisonment—would not affect their deliberations. Those who could not were excused from jury duty for cause.

But in 1980, the U.S. Supreme Court ruled that only individuals who say they cannot assess the death penalty under under [sic] any circumstances can be excused for cause. The case, Adams v. Texas, involved a Dallas County defendant tried for killing a police officer.

In Adams, Supreme Court justices concluded: "To exclude all jurors (for cause) who would be in the slightest way affected by the prospect of the death penalty ... would be to deprive the defendant of the impartial jury to which he or she is entitled under the law."

Some legal scholars, as well as Supreme Court Justices William Brennan and Thurgood Marshall, claim prosecutors

are abusing the same constitutional rights protected in Adams.

Brennan, in a recent dissenting opinion, wrote that using peremptory challenges to exclude everyone with reservations about capital punishment creates a "hanging jury."

Many blacks in Dallas express some reservations about the death penalty, yet are kept in the jury pool after saying they could assess death in some circumstances. Kinne said those potential jurors are the ones prosecutors are told to strike with peremptory challenges.

"We teach (prosecutors) that if someone expresses doubts about his ability to follow the law, then you get rid of him,' Kinne said. "If it turns out that they're black, that's just how it falls."

Dallas lawyer Royce West, a black former prosecutor and recent Democratic candidate for district attorney, said he doubts Kinne's explanation of why blacks have been excluded.

"I know, based on my experience not only as a prosecutor but as a defense lawyer, that black people are just as interested in justice and making sure that individuals who don't belong on the street stay off the street."

A review of trial transcripts in the 15 Dallas County capital cases showed that 33 of the 56 blacks struck by prosecutors voiced reservations about the death penalty. The remaining 23 stated that they could access the death penalty.

Beneath the exacting legal minutiae, the criminal justice system is fueled by the same stereotypes held by the community at large.

In a 1969 speech that later was incorporated into a statewide training manual for prosecutors, former Dallas County Assistant District Attorney Jon Sparling emphasized that minorities "almost always empathize with the accused" and do not make good jurors.

That perception, says defense lawyer Byck, is evident today in prosecutors' jury selection in capital cases.

"I get the impression that they use a racial stereotype much the same, and literally it almost comes out of the Jon Sparling manual where blacks, Jews, well-educated women are too sensitive, too equivocating, too whatever to put on a capital murder jury," Byck said.

Gaynelle Jones, a black Harris County felony prosecutor, said eliminating people who aren't likely to be receptive to the prosecutor's case—regardless of their race—is just common sense.

"I just can't see myself stacking the cards against me," said Ms. Jones.

Said John Paul Davis, the Jefferson County municipal judge: "I do believe to some extent blacks tend to be more inclined not to be spoonfed by the prosecution. They tend to be a little more independent. . . . In fact, I think that makes them more valuable on a jury."

Davis said that while blacks are chosen for some juries, they are "habitually excluded from juries when blacks are defendants, which smacks of the fiercest kind of racism."

Of the four death row cases from Jefferson County examined by The News, one inmate is white, the others black. The News' analysis showed that one black juror was impaneled in the white defendant's trial; the three blacks were sentenced to death by all-white juries.

"We look at who will enforce the law as we see it, and who won't,' said Jefferson County District Attorney James S. McGrath. "More blacks, through my experience, would be against, or weaker on, the death penalty than other groups. We may be influenced to that extent."

However, McGrath said, his prosecutors never have "systematically excluded" any ethnic or racial group.

"We're cognizant of the fact that certain groups of people make the best jurors," he said. "If you want a fine jury, get yourself 12 Germans on there, and you're going to fly. Statistically, German people are more strict in law enforcement than any group that we know of." Beaumont lawyer

Cooper, a former assistant on McGrath's staff, said he was never told not to let blacks on a jury, but felt some pressure.

"Any time a jury came back with what was less than considered to be the appropriate punishment from a prosecutorial point of view, then a reason had to be attached," he said. "And I might be asked, "How many blacks were on the jury?"

John Vance, who will succeed Wade Jan. 1 as Dallas County district attorney, said he intends to record the race of each prospective juror in felony trials, and will personally question any prosecutor whose use of peremptory challenges appears to be racially motivated.

In Tarrant County, a written policy prohibits the systematic exclusion of minorities from juries. Juries that convicted four to death row were examined by The News—three were allwhite, the fourth, which convicted a black defendant, included one black juror.

Tarrant County District Attorney Tim Curry said many minorities are "weak on capital punishment' and excused with peremptory challenges for that reason.

Dallas lawyer Mel Bruder, who represented Randall Dale Adams, the defendant in Adams, notes that peremptories also eliminate individuals who won't be fair to the defendant, and warns against too vigorous an attack on their use.

"If you don't like them because they're being used in some discriminatory manner, then they'll have to be abolished," Bruder said. "And I think that would be a greater disservice to the defendants than having them, and allowing the state to strike people who are ... weak."

Prosecutors argue that their first responsibility is to get a conviction and find the jurors who will give it to them.

Troy Woods was the only black juror in the 15 Dallas County capital murder trials involving a black defendant. His views on the death penalty were unwavering during jury selection.

"What I call punishment is back to the old Indian days," he said. "Pour some honey on them and stake them out over an antbed.... That's what I call punishment."

Woods, 46, was a juror in the trial of Thomas Joe Miller-El, who was sentenced to death in March for the robbery-murder of an Irving motel clerk.

By the time a trial begins, said Holmes, the Houston district attorney, "We've resolved any doubt about the guilt of the accused in our hearts—this is a guilty son of a bitch and we're trying to find somebody who's going to put him in the pen."

Sammie Lee Parker was one of four blacks whose opposition to the death penalty kept him from serving on the all-white Dallas jury in 1985 that tried Ronald Curtis Chambers and sentenced him to death.

"I guess the main reason that I'm against the death penalty ... is maybe 80 or 90 percent of the time there is a black man involved," Parker testified.

"I am not defending them, because I know we do wrong like everybody, but I think the black man normally gets the tail end of (the) deal."

Parker's view is shared by many who claim that blacks historically have received harsher treatment from a jury system that has excluded them.

For that reason, many blacks mistrust the legal system. Almost half the blacks summoned for jury service in Dallas County were excluded by the judge because of their stated opposition to the death penalty.

"Minorities correctly realize . . . that they have little chance at the courthouse, or at least that they're running behind," said Corpus Christi lawyer Doug Tinker, an authority on jury selection in capital trials. "They go down there and they're scared to death. They're like a rabbit in the headlights of a car."

George C. Wright, director of Afro-American studies at the University of Texas, believes blacks and whites see the

law differently: "The whites see the law as the protectors. Black people see it as the oppressor."

In 1924, when Texas began using the electric chair for executions, the first four inmates seated—all in one night—were black. From 1924 through 1964, 504 defendants were sentenced to death; 63 percent of the 361 defendants actually executed were black.

The last to die in the Texas electric chair—on July 30, 1964—was 27-year-old Joseph Johnson Jr., a Houston black convicted of murder.

Because of several factors, executions in Texas were interrupted from 1964 to 1981: anticipation of a U.S. Supreme Court ruling on the constitutionality of the death penalty; a sweeping 1972 Supreme Court decision that overturned potentially discriminatory state laws; and appeals that tested Texas' capital punishment law passed in 1973.

On Dec. 7, 1982, in Huntsville, Charlie Brooks Jr., a Fort Worth black convicted of killing a car dealer, became the first inmate to be executed by lethal injection in the nation.

Fort Worth lawyer Danny Burns unsuccessfully appealed Brooks' conviction, arguing that the Texas death penalty was "a disproportionately severe and excessive punishment ... being imposed pursuant to a pattern of racial, economic, and sexual discrimination."

Statewide application of the death penalty echoes the pattern in Dallas County. Since 1924, 17 whites and 40 blacks from Dallas County have been executed.

Five whites and 17 blacks from Dallas County have been executed during Wade's tenure as district attorney. Ten of the blacks were executed before 1964 for what are no longer capital offenses—nine for rape and one for robbery with a firearm.

Gerald Goldstein, general counsel for the Texas Civil Liberties Union, said the attitude among many blacks against the death penalty should surprise no one.

"It should come as no shock to us any more than if we went to Spain after the Inquisition and could find the few Jews left and ask them what they thought," Goldstein said. "I imagine they would have some problems with the system at that point."

Houston lawyer Ron Mock, a black, believes the solution to a cycle of skepticism—one that makes blacks distrust the system and the system mistrust them—can't be written in the law.

"My changes would involve . . . the hearts and minds of people as a whole to see each other as a brother as equal folks under the law," he said.

"Those are the things you'd have to change. You'd have to change ordinary people. That's the problem."

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

1. GRAPH (Credit:DMN * Source:DMN) DEATH PENALTY CASES:

RACIAL MAKEUP OF JURIES BY COUNTY 2. CHART (No credit given) RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES 3. PHOTO (Credit:DMN-Jan Sonnenmair) John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews. 4. PHOTO (Credit:DMN-Jan Sonnenmair) Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl. 5. GRAPH (Credit/Source:DMN) FEW BLACKS SELECTED FOR DALLAS DEATH PENALTY TRIALS 6. GRAPH (Credit /Source: DMN) POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE 7. PHOTO (Credit:DMN-Jan Sonnenmair * This Photo ran in the BULLDOG Edition ONLY) Calvin Williams, a Houston man on death row, was convicted by an all-white jury. 8. GRAPH (Credit/Source: DMN * This Graph ran in the BULLDOG Edition ONLY) CHANCES OF SERVING IN DALLAS

DEATH PENALTY TRIALS, BY RACE; LOCATION: Graphs-NR. Photos: 1.-2. Oversize Black/White File. 3. Prisons & Prisoners-Texas.

SUPREME COURT OF THE UNITED STATES

THOMAS JOE MILLER-EL,
petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.

No. 03-9659
June 28, 2004
Case below, 361 F.3d 849
[124 S.Ct. 2908]

Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

03-9659

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September 2, 2004

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No. 03-9659

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), that it nullified the protections against invidious discrimination set forth in *Batson* and *Miller-El I* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. § 2254(d)(2) and (e)(1).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DIRECTION TO CONSIDER FULLY THE EVIDENCE OF A LONGSTANDING PATTERN AND PRACTICE OF DISCRIMINATION. 13

II. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DIRECTION TO WEIGH THE EVIDENCE THAT THE PROSECUTORS USED JURY SHUFFLES TO MANIPULATE THE RACIAL COMPOSITION OF THE JURY. 18

III. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S GUIDANCE TO CONSIDER THE EVIDENCE THAT THE PROSECUTION USED DISPARATE QUESTIONING TO REMOVE AFRICAN-AMERICANS FROM THE JURY. 22

A. Views On The Death Penalty 23

B. Minimum Sentencing 29

TABLE OF CONTENTS—Continued

Page

IV. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S GUIDANCE IN ASSESSING WHETHER ANY NON-AFRICAN-AMERICAN VENIRE MEMBERS WERE SITUATED SIMILARLY TO THE AFRICAN-AMERICANS STRUCK BY THE STATE. 32

V. THE COURT OF APPEALS FAILED TO ASSESS CRITICALLY THE EXTENT TO WHICH THE STATE TRIAL COURT'S JUDGMENT WAS ENTITLED TO DEFERENCE, AND FAILED TO CONSIDER THE CUMULATIVE WEIGHT OF THE EVIDENCE OF RACIAL DISCRIMINATION. 44

VI. THIS COURT SHOULD ORDER THAT HABEAS CORPUS RELIEF BE GRANTED. 46

CONCLUSION 47

TABLE OF AUTHORITIES

CASES

Page(s)

Miller-El v. *State*, 748 S.W.2d 459 (Tex. Crim. App. 1988) 1
Batson v. *Kentucky*, 476 U.S. 79 (1986) ..... i, 2, 5, 21
C.E.J. v. *State*, 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied) 17
Cassell v. *Texas*, 339 U.S. 282 (1950) 13
Chambers v. *State*, 784 S.W.2d 29 (Tex. Crim. App. 1989) 16
Chivers v. *State*, 796 S.W.2d 539 (Tex. App—Dallas 1990, pet. ref'd) 16
Crouch v. *State*, 1993 WL 265424 (Tex. App.—Dallas June 12, 1993, pet ref'd) 17
Ex Parte Haliburton, 755 S.W.2d 131 (Tex. Crim. App. 1988) 16
Gray v. *Mississippi*, 481 U.S. 648 (1987) 19
Hernandez v. *New York*, 500 U.S. 352 (1991) 20, 45
Hill v. *State*, 827 S.W.2d 860 (Tex. Crim. App.), *cert. denied*, 506 U.S. 905 (1992) 16
Hill v. *Texas*, 316 U.S. 400 (1942) 13
Huffman v. *State*, 450 S.W.2d 858 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972) 29
Miller-El v. *Johnson*, 261 F.3d 445 (5th Cir. 2001) 1
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) ..... i, 1
Miller-El v. *Dretke*, 361 F.3d 849 (5th Cir. 2004) 1
Miller-El v. *State*, 790 S.W.2d 351 (Tex. App.—Dallas 1990) 13
Miller-El v. *Texas*, 510 U.S. 831 (1993) 6
Ramirez v. *State*, 862 S.W.2d 648 (Tex. App.—Dallas 1993) 17
Reich-Bacot v. *State*, 789 S.W.2d 401 (Tex. App.—Dallas 1990) 17
Swain v. *Alabama*, 380 U.S. 202 (1965) 4
Vann v. *State*, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd) 17

TABLE OF AUTHORITIES—Continued

	Page(s)
Witherspoon v. *Illinois*, 391 U.S. 510 (1968)	23
Young v. *State*, 848 S.W.2d 203 (Tex. App.—Dallas 1992)	16

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2241	6
28 U.S.C. § 2254	6
28 U.S.C. § 2254(d)	2
28 U.S.C. § 2254(d)(2)	i, 2, 46
28 U.S.C. § 2254(e)(1)	i, 2, 46

OPINIONS BELOW

The opinion of the court of appeals (JA 1-20) is reported at 361 F.3d 849. This Court's previous opinion (JA 21-64), reversing and remanding the case to the Fifth Circuit, is reported at 537 U.S. 322. The earlier opinion of the court of appeals denying a COA (JA 993-1007) is reported at 261 F.3d 445. The opinion of the district court (JA 987-992) and the findings and recommendations of the magistrate judge that it adopts (JA 946-986) are unreported. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding it to the trial court (JA 885-889) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 924-929) and the second opinion of the Texas Court of Criminal Appeals (JA 930-945) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2004. The petition for certiorari was filed on April 1, 2004 and granted on June 28, 2004. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2254(d) and (e)(1) of Title 28, United States Code, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

Despite overwhelming evidence of racial discrimination in the selection of petitioner's jury, strong indications that the state courts mishandled that evidence, and this Court's reversal of the court of appeals' prior ruling with detailed instructions on how to assess the evidence properly, the court of appeals on remand nonetheless found again that petitioner's claim under *Batson* v. *Kentucky* was insufficiently established. It did so largely by ignoring this Court's direction.

This Court has already summarized the powerful evidence showing that the prosecutors at petitioner's 1986 trial used their peremptory challenges to exclude African-Americans from the jury: They were trained in an office culture "suffused with bias against African-Americans in jury selection." JA 41. They used two deliberately deceptive methods to question almost all of the African-American venire members in order to create bases for striking them from the panel, while employing different and straightforward methods of questioning most white venire members. JA 38-40. One of the prosecutors was found guilty of racial discrimination in another case tried at the same time as petitioner's, based on exactly the same racially disparate questioning used here. JA 40. The prosecutors' use of so-called "jury shuffles" to re-arrange the order of the venire whenever African-Americans appeared likely to serve on petitioner's jury "raise[s] a suspicion that the State sought to exclude African-Americans from the jury" (*id.*), and neither the State nor the court of appeals has ever offered an alternative explanation that would prevent that suspicion from ripening into a confident belief. And "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37.

Moreover, as this Court also explained, the signs that the state courts failed to assess that evidence properly—and so were not entitled to the deference normally accorded on federal habeas review—were equally clear cut. The state trial court made its assessments of the prosecutors' credibility two years after the trial, thus leaving its conclusions "subject to the usual risks of imprecision and distortion from the passage of time." JA 37. That court concluded that petitioner had not even established a prima facie case of race discrimination, a conclusion this Court called a "clear error" and the State disavowed. JA 42. And the state courts "made no mention" at all of two of the four clusters of evidence of racial discrimination that petitioner presented and this Court addressed. *Id.*

Yet on remand the court of appeals—which had denied even a certificate of appealability to petitioner on its initial review of the matter—again concluded that the prosecutors

had not violated *Batson*. In the process, it deferred to precisely the same defective state-court determinations that this Court had identified as suspect. Given this Court's recitation of the powerful evidence of discrimination and the weaknesses in the state courts' analysis, the ruling below stands as a disturbing signal that conclusory findings by state courts, no matter how implausible, can deny the promise of *Batson* and federal habeas review, and that at least some federal courts are prepared to avert their eyes from even the clearest examples of racial bias. Only by condemning the blatant discrimination apparent in this record can this Court assure that the teaching of *Batson* and the Court's careful, specific illustration of that teaching in *Miller-El I* remain clear and compelling.

STATEMENT OF THE CASE

1. In 1986 petitioner Thomas Joe Miller-El, an African-American, was convicted of capital murder and sentenced to death by a jury from which the prosecutors had peremptorily struck 10 of the 11 African-Americans qualified to serve. *See* JA 23, 26.

After the completion of voir dire for jury selection, petitioner moved to strike the jury due to purposeful racial discrimination in its selection. He relied upon the then-controlling precedent of *Swain* v. *Alabama*, 380 U.S. 202 (1965), which required petitioner to show that the "prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service." JA 23. Under *Swain*, discrimination in this case was not at issue. At the *Swain* hearing, "petitioner presented extensive evidence" of a pattern and practice of discrimination by the Dallas County, Texas, District Attorney's ("D.A.") office. *Id.* The trial judge concluded, however, that while racial discrimination in jury selection "'may have been done by individual prosecutors in individual cases[,]'" there was no evidence that indicated a "'systematic exclusion of blacks as a matter of policy by the District Attorney's office[.]'" *Id.* (internal citation omitted). He therefore denied the motion to

to strike, and petitioner was tried, found guilty, and sentenced to death.

2. While petitioner's appeal was pending, this Court decided *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and in so doing "established its three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause." JA 23. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." JA 23-24 (internal citations omitted).

The Texas Court of Criminal Appeals "acknowledg[ed that] petitioner had established an inference of purposeful discrimination" under step one of *Batson*, and it remanded to the trial court for a *Batson* hearing. JA 24. At this post-trial hearing, which took place "a little over two years after petitioner's jury had been empaneled," the trial court admitted all of the evidence submitted at the *Swain* hearing as well as additional evidence and testimony. *Id.*

Despite the Texas Court of Criminal Appeals' finding that petitioner had made out a prima facie case of discrimination as required under *Batson* step one, the trial court concluded that petitioner's evidence failed to "'even raise an inference of racial motivation in the use of the state's peremptory challenges.'" JA 24 (internal citations omitted). The trial court also concluded that the State would have prevailed at steps two and three in any event, because the prosecutors "had offered credible, race-neutral explanations" for each of the 10 African-Americans excluded. *Id.* The court "found 'no disparate prosecutorial examination of any of the veniremen in question,'" and found "'that the primary reasons for the exercise'" of the peremptory challenges against the African-American veniremen in question was "'their reluctance to assess or reservations concerning the imposition of the death penalty.'" *Id.* (internal citation omit-

ted). As this Court observed, "[t]here was no discussion of petitioner's other evidence." *Id.* The Texas Court of Criminal Appeals denied petitioner's appeal, and this Court denied certiorari. *Miller-El* v. *Texas*, 510 U.S. 831 (1993).

3. After unsuccessfully pursuing state habeas relief, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254, raising several claims, including a claim that the prosecutors had selected his capital jury in violation of *Batson*. Although the federal magistrate judge who considered the merits of the *Batson* claim concluded that nothing less than a pattern and practice of discrimination in jury selection could explain the "appalling" statistics regarding the exclusion of African-Americans from jury service in Dallas County, he considered such evidence relevant only to whether petitioner had established a prima facie case, and he specifically declined to consider it in deciding the ultimate question of purposeful discrimination. JA 24-25, 958, 966. The district judge adopted the magistrate judge's recommendations and denied relief. JA 25. The district court also denied petitioner's application for a COA. *Id.*

The Fifth Circuit dismissed petitioner's *Batson* claim and denied a COA, concluding that the "findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record." JA 1001.

4. This Court granted certiorari and reversed. With one dissent, the Court had "no difficulty concluding" that that court of appeals' decision should be reversed and that a COA should have issued. JA 36. The Court identified two fundamental flaws in the Fifth Circuit's analysis. First, the Fifth Circuit had incorrectly decided the merits of the underlying constitutional claim rather than the "debatability" of that claim as is required in determining whether a COA should issue. JA 37. Second, in addressing the merits, the Fifth Circuit had seriously erred in its analysis and evaluation of petitioner's evidence. JA 36. To correct the Fifth

Circuit's flawed approach, this Court provided clear instruction on the manner in which the evidence here should be evaluated under *Batson*'s three-step framework.

The Court explained that its "determination to reverse the Court of Appeals" required it "to explain in some detail" its "preliminary" assessment of the "extensive evidence" of discrimination in jury selection in petitioner's case. JA 26, 33. The Court observed that both the district court and the court of appeals had failed to "give full consideration to the substantial evidence petitioner" presented. JA 36. Instead, they had mistakenly "accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial." *Id.* This Court explained that the federal courts' deference to the state trial court's finding was misplaced, in part because "the state trial court had no occasion to judge the credibility" of the prosecutors' proffered race-neutral reasons at the time they were made, but only two years later. JA 37. "As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time." *Id.*

This Court then took up each category of evidence of racial discrimination identified by petitioner and explained both how the court of appeals had failed to address that evidence properly and how that evidence should be analyzed. *First*, the Court questioned the credibility of the State's after-the-fact explanations for its peremptory strikes by noting that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. *Second*, the Court "question[ed] the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning." JA 38. Contrary to the conclusion of the state court, this Court found that "[d]isparate questioning did occur" (*id.*)—both with respect to views on the death penalty and with respect to minimum sentencing—and further observed that the State had failed even to offer an ex-

planation for its racially disparate questioning about minimum sentences (JA 39). Moreover, the Court noted, "while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." JA 40. Thus, the Court concluded that, based on its "threshold examination," the record indicated that "the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." *Id.*

Next, this Court examined the prosecutors' use of the so-called jury "shuffles" to manipulate the racial composition of petitioner's jury. "We agree with petitioner," the Court stated, "that the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." JA 40. The Court's concerns were "amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past." *Id.* The Court found that the prosecution's behavior during the jury shuffles "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection." *Id.*

Finally, the Court turned to the "historical evidence of racial discrimination by the District Attorney's Office." JA 41. The Court thought it significant that for many decades "African-Americans almost categorically were excluded from jury service" in Dallas County. *Id.* The Court pointed out that "[o]nly the Federal Magistrate Judge addressed the import of this evidence in the context of a *Batson* claim; and he found it both unexplained and disturbing." *Id.* In the Court's view, the evidence "reveals that the culture of the

District Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Id.* In explaining why this evidence was "of course . . . relevant" to the ultimate resolution of petitioner's claim of racial discrimination at step three of the *Batson* framework, the Court observed that "[b]oth prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries" and that "[t]he supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." *Id.*

In closing, the Court emphasized the unreliability of the state courts' assessment of petitioner's claim. The Court pointed out that the "state courts [had] made no mention" at all of "either the jury shuffle or the historical record of purposeful discrimination." JA 42. The Court's dissatisfaction with the state courts' handling of petitioner's case was "heightened" by the fact that although the state trial court had been "presented with this evidence," it still "somehow reasoned that there was not even the inference of discrimination to support a prima facie case"—a "clear error" that "the State declines to defend[.]" *Id.* The Court reversed and remanded for reconsideration in light of its opinion.

5. The Fifth Circuit's opinion on remand incorporated *verbatim* (but without attribution) passages from the dissenting opinion in this Court and from the State's brief (which in turn largely repeated the State's unsuccessful brief in this Court). The Fifth Circuit denied relief, concluding despite this Court's extensive analysis of the evidence that petitioner "has failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." JA 20.

In so ruling, the court of appeals barely considered Dallas County's long history of racial discrimination in jury selection, giving that evidence less attention than this Court had already done in what it characterized as only a "threshold examination." JA 41. The court dismissed "the relevancy of [the] evidence as less significant" because peti-

tioner had "already met the burden under the first step of *Batson*" (JA 7-8), even though this Court had made plain that petitioner's having established his prima facie case at step one should have no impact on the continuing probative weight at step three of the "unexplained and disturbing" evidence of Dallas County prosecutors' extended history of racial selectivity in picking juries (JA 41).

The court of appeals gave even less attention to the evidence concerning the State's efforts to use the "jury shuffles" to keep African-Americans off petitioner's jury. The court offered no explanation for those efforts, which on their face betray the prosecution's discriminatory intent.

The court of appeals gave more space to discussing whether there were any non-African-American jurors who were similar to the African-Americans struck by the prosecution. But it prefaced its entire discussion with the observation that "[o]nce we have identified the reasons for the strikes, the credibility of the [prosecutors'] reasons is *self-evident*." JA 9 (emphasis added).

Finally, despite this Court's determination that "[d]isparate questioning did occur" (JA 38), the court of appeals continued to insist that the prosecution "did not question venire members differently[.]" JA 19. In the court of appeals' view, the "great[] disparity along racial lines" (JA 39), that this Court discerned in the prosecution's methods of questioning venire members was entirely explained by venire members' views about the death penalty. JA 16-20.

This Court again granted certiorari. JA 1052.

SUMMARY OF ARGUMENT

In its first review of petitioner's case, this Court conducted a meticulous examination of the several kinds of evidence in the record bearing upon his claim that African-American prospective jurors had been systematically stricken from his jury on account of race. The Court's opinion explained the relevance of each category of evidence to the ultimate issue of racial motivation at the third step of the three-step inquiry required by *Batson* v. *Kentucky*. Responding to the Fifth Circuit's cursory and dismissive treatment of the evidence, this Court was at pains to model in detail the appropriate method for analyzing each sort of evidence first in its own right and then all together, as is necessary for effective implementation of *Batson*. It sent the case back to the Fifth Circuit to conduct the requisite analysis.

On remand, the Fifth Circuit simply did not do that. It again dismissed out of hand two of the four kinds of evidence that this Court had found relevant. In reviewing the remaining two categories of evidence, it disregarded the issues framed by this Court's analyses and relied centrally on abstracts of the record taken verbatim from the State's brief on remand, which had taken many of them in turn from the dissenting opinion in this Court. It treated each category of evidence in isolation and declared it insufficient standing alone, without analyzing the cumulative weight of all the evidence of racial discrimination.

To clarify and fulfill the commands of *Batson* and *Miller-El I*, it remains for this Court to demonstrate how the analytic methods prescribed by those decisions should actually be applied in evaluating evidence. This record is uniquely suitable for such a demonstration because of the clarity with which the evidence comes together to refute the State's claim that race played no part in its prosecutors' decision to strike all but one qualified African-American from the *Miller-El* trial jury. As this Court has already observed, four clusters of evidence combine to show that the prosecutors were predisposed to exclude African-Americans from the jury and in fact engaged in exclusionary behavior that cannot be explained on grounds other than race. Taken together, the totality of mutually-reinforcing evidence of racially discriminatory motive and behavior overwhelmingly establishes that the State's proffered race-neutral justifications for striking African-American jurors were mere pretexts for unconstitutional discrimination.

First, the record demonstrates that the culture of the Dallas County D.A.'s office was suffused with bias against

African-American jurors at the time of petitioner's trial and that the very prosecutors in petitioner's case had previously engaged in racist jury selection practices. As this Court observed, this stark evidence of historical discrimination impeaches the State's defense of its racially disproportionate peremptory strikes and the reasonableness of the state trial court's decision, which failed to mention the historical record at all.

Second, the record demonstrates that the prosecutors used the jury-shuffle process to exclude African-Americans from the voir dire process when it had no information about veniremembers other than race. Yet the State has persistently failed even to *offer* a race-neutral explanation for its prosecutors' use of jury shuffles.

Third, the record demonstrates that the State engaged in racially disparate questioning in order to create artificial grounds for striking African-American jurors. The State concedes that it employed disparate questioning, but maintains that—despite its prosecutors' obvious preoccupation with excluding African-Americans from the jury—race was not among the factors it indulged in selecting jurors to target. As this Court concluded, however, even the State's own view of the evidence does not support its claim that race was not a trigger for manipulative questioning.

Fourth, the record demonstrates—and this Court concluded—that the State's proffered race-neutral rationales for striking six African-American jurors pertained equally well to some white jurors who were not challenged and who served on the jury. Even one instance of race-based juror exclusion would, of course, violate petitioner's constitutional rights.

Despite this overwhelming evidence that the state trial court erred in crediting the State's patently pretextual explanations, the Fifth Circuit accepted the trial court's conclusion. That is unacceptable, and this Court should now say so, giving concrete meaning to its earlier admonition that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." JA 35.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DIRECTION TO CONSIDER FULLY THE EVIDENCE OF A LONGSTANDING PATTERN AND PRACTICE OF DISCRIMINATION.

There is no more striking feature of this case than the long, sorry history of intentional race discrimination in jury selection practiced by the Dallas County D.A.'s office up through and extending beyond the time of petitioner's trial, a history termed "appalling" by the federal magistrate. JA 966. In the light of that history, this Court recognized that bias in jury selection "suffused" the culture of the D.A.'s office at the time of petitioner's trial. JA 41. The detailed evidence of that history is set forth in petitioner's brief on the merits in *Miller-El I*. Pet. Br. 3-8, No. 01-7662 (U.S. 2002).[1]

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[1] At the time of trial in this case, Dallas County's extensive record of race discrimination in jury selection was well documented. In *Hill* v. *Texas*, 316 U.S. 400 (1942), this Court addressed practices that, prior to 1940, completely excluded African-Americans from county grand juries. Noting that "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period," the Court concluded that Dallas County jury commissioners had "discriminate[d] in the selection of jurors on racial grounds." *Id.* at 404. In *Cassell* v. *Texas*, 339 U.S. 282, 286 (1950), this Court concluded that "subsequent to the *Hill* case the Dallas County grand-jury commissioners . . . consistently limited Negroes selected for grand-jury service to not more than one on each grand jury." Thus, this Court held, Dallas County continued unconstitutionally to discriminate against African-Americans with respect to grand jury service.

Henry Wade was first elected Dallas County District Attorney in 1951, the year after *Cassell* was decided, and served until 1987, the year after petitioner was convicted. JA 1019, 1028, 1038. According to a *Dallas Morning News* study published shortly before petitioner's trial, despite *Hill* and *Cassell*, the D.A.'s office engaged throughout Wade's tenure in a consistent practice of striking African-Americans from juries in serious criminal cases, particularly where the defendant was African-American. JA 1028. The story quoted District Judge Jack Hampton, who had served on Wade's staff from 1958 to 1962, as saying that after he once allowed an African-American woman to serve as a juror in a criminal case

After considering it, this Court concluded that African-Americans in Dallas County "almost categorically were excluded from jury service." JA 41.

This Court emphasized the importance of this history to resolution of petitioner's *Batson* claim in two key respects. *First*, historical evidence of racial discrimination by the District Attorney's office was clearly relevant to the ultimate question of purposeful discrimination in selecting petitioner's jury. JA 41. Specifically, such evidence—though adduced in part to support petitioner's prima facie case—should also be weighed in making the ultimate determination under step three of *Batson* whether to credit the prosecutors' purported race-neutral reasons for their racially disproportionate peremptory strikes. As this Court explained, such bias is "of course . . . relevant to the extent it casts

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that eventually ended in mistrial, Wade reprimanded him: "If you ever put another nigger on a jury, you're fired." *Id.*

Studies conducted by the *Dallas Morning News* in 1986 showed that discriminatory jury selection practices in Dallas County continued unabated in the 1980s. One study analyzed 100 randomly selected felony jury trials conducted in Dallas County between 1982 and 1984. JA 1022. It demonstrated that prosecutors "routinely manipulate[d] the racial composition of juries through their use of peremptory challenges." JA 1018. In the 100 trials studied (which involved approximately 4,434 prospective jurors), 92% of the African-Americans peremptorily struck were struck by prosecutors. JA 1022. Consequently, although African Americans comprised 18% of the Dallas County population in 1986, they accounted for fewer than 4% of jurors in felony trials. JA 1018.

Another *Dallas Morning News* study revealed that, almost exclusively due to prosecutors' use of peremptory strikes, nine out of every ten African Americans qualified to serve on capital murder juries between 1980 and 1986 were never permitted to do so. JA 1036. In the fifteen capital trials studied, prosecutors were responsible for striking 98% of the African Americans eliminated from jury service by peremptory strikes. *Id.* When combined with the prosecution's use of for-cause challenges, this practice meant that only one in twelve African American veniremembers were selected as jurors in Dallas County capital cases between 1980 and 1986, compared to a rate of one in three for whites and one in four for Latinos. JA 1037.

doubt on the legitimacy of the motives underlying the State's actions in petitioner's case." *Id.*

Second, this Court made clear that the state courts' failure even to "mention . . . the historical record of purposeful discrimination" in evaluating petitioner's claim, and the trial court's indefensible conclusion "that there was not even the inference of discrimination to support a prima facie case," weighed heavily against the validity of their ultimate determination of a lack of purposeful discrimination. JA 42.

Despite this Court's clear rulings, the Fifth Circuit disregarded the historical evidence in both respects. Rather than weighing the credibility of the prosecutors' proffered race-neutral reasons against this backdrop of an established pattern of racial discrimination in jury selection, as this Court directed, the Fifth Circuit did just the opposite. This Court had ruled that "[i]t goes without saying" that such evidence bears strongly on the issue of pretext at step three of *Batson* (JA 35), taking careful note of the fact that petitioner had already met step one, but insisting that the powerful historical evidence had to be considered in step three as well (JA 41). Yet the Fifth Circuit discounted the relevance of the historical evidence at step three, "because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." JA 7-8.

Indeed, perhaps most strikingly, the Fifth Circuit failed altogether to acknowledge, let alone weigh the significance of, the fact that both prosecutors involved in petitioner's jury selection—Paul Macaluso and James Nelson—were personally implicated in the Dallas D.A.'s Office's history of racial discrimination. They both joined when that office formally trained its prosecutors to exclude minorities from juries. JA 41.[2] As this Court indicated, that evidence alone

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[2] A 1963 Dallas County D.A.'s office manual instructed prosecutors to exercise peremptory strikes against African-Americans and members of other minority groups: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how

bolsters the "supposition that race was a factor" in petitioner's jury selection. *Id.* Moreover, both prosecutors engaged in discriminatory jury selection tactics in other cases during the same period, leading to the reversal of two convictions on *Batson* grounds. As this Court noted, in a case tried shortly before petitioner's, Macaluso was found to have engaged in the same disparate questioning on the basis of race that was employed in this case, to have used peremptory strikes improperly to exclude African Americans, and to have offered false, pretextual explanations for his actions in selecting the jury in that case. JA 40; *see Chambers* v. *State*, 784 S.W.2d 29, 31-32 (Tex. Crim. App. 1989) (en banc). Nelson was lead prosecutor in the trial of petitioner's wife just three months after petitioner's trial, in which the prosecution's purported race-neutral reason for one of its peremptory strikes was found to be a pretext for purposeful racial discrimination. *See Miller-El* v. *State*, 790 S.W.2d 351, 357 (Tex. App.—Dallas 1990).[3] Moreover, this Court noted, the

well educated . . . . [T]hey will not do on juries.'" JA 1028. In 1969, Assistant D.A. John Sparling drafted another manual, used in training sessions (JA 808-810, 865-866, 869-871, 874-875) and distributed to incoming prosecutors under the title "Jury Selection in a Criminal Case." JA 99. This manual advised that selection of jurors should "depend on . . . the age, color and sex of the Defendant" (*id.*), and that prosecutors should exclude "any member of a minority group which may subject him to oppression" (JA 100). According to the manual, "[m]inority races almost always empathize with the Defendant." JA 102. The Sparling manual served as a training tool into the 1980s, *see Ex Parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988), and was therefore part of the training given to the prosecutors who handled jury selection in petitioner's case. Macaluso joined the Dallas County DA's office in the early 1970s. JA 900. Nelson joined the office in 1980. *See* http://www. lockeliddell.com (website of Nelson's current firm, which lists his professional background) (last visited on Sept. 2, 2004).

[3] Following this Court's decision in *Batson*, several other Dallas County criminal convictions were overturned on the ground that prosecutors had used peremptory challenges improperly to remove African American veniremembers. *See, e.g., Young* v. *State*, 848 S.W.2d 203 (Tex. App.—Dallas 1992); *Ramirez* v. *State*, 862 S.W.2d 648 (Tex. App.—Dallas 1993); *Chivers* v. *State*, 796 S.W.2d 539 (Tex. App—Dallas 1990, pet. ref'd); *Hill* v. *State*, 827 S.W.2d 860 (Tex. Crim. App.) (en banc), *cert. denied*, 506 U.S. 905 (1992); *C.E.J.* v. *State*, 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied); *Vann* v. *State*, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd); *Reich-Bacot* v. *State*, 789 S.W.2d 401 (Tex. App.—Dallas 1990); *Crouch* v. *State*, 1993 WL 265424 (Tex. App.—Dallas, July 12, 1993, pet. ref'd).

supposition that race influenced the prosecutors' voir dire tactics "could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." JA 41. The Fifth Circuit found Macaluso and Nelson's race-neutral justifications here to be credible without even mentioning these considerations.

The court of appeals also ignored this Court's observation that the state courts' handling of the historical evidence discredited their evaluation of the credibility of the prosecutors' evaluations. Instead, the Fifth Circuit blankly asserted that the state court was "in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine." JA 8. In so ruling, the Fifth Circuit failed to acknowledge another of this Court's central observations: that the trial court conducted the *Batson* hearing more than two years after jury selection, significantly reducing any advantage in making credibility determinations (JA 37), and that these determinations were made by a trial judge who, even after a remand in which the Texas Court of Criminal Appeals had found that petitioner had met his step-one burden, "somehow" explicitly concluded that he had not done so (JA 42).

Had the Fifth Circuit followed this Court's direction concerning the historical evidence—evidence about policies in place in the D.A.'s office *at the time of petitioner's trial* and evidence about the practices of *the very prosecutors* in petitioner's case—and this Court's direction concerning the shortcomings of the state court's process and determinations, then the Fifth Circuit could not have deferred to those state-court determinations. It would instea have been compelled to recognize the lack of credibility in the prosecu-

tors' claims that race played no part in their decisions to strike all but one qualified African-American from petitioner's jury.

II. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S DIRECTION TO WEIGH THE EVIDENCE THAT THE PROSECUTORS USED JURY SHUFFLES TO MANIPULATE THE RACIAL COMPOSITION OF THE JURY.

This Court also directed the Fifth Circuit to consider the evidence regarding "jury shuffles." JA 40. The jury shuffle is a technique the Dallas County District Attorney's Office used—by its own admission—to "manipulate the racial composition of the jury." *Id.* Under Texas criminal practice, parties are permitted to "rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled." JA 28. The party requesting the procedure, with no information beyond the appearance of the venire members, "literally shuffles the juror cards, and the venire members are then reseated in the new order." *Id.* Venire members who are shuffled to the back of the seating area are unlikely ever to serve, because any member not questioned during voir dire is dismissed at the end of the week. JA 28-29.

This Court agreed with petitioner that "on at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel" and that "[o]n yet another occasion the prosecutors . . . lodged a formal objection [to a defense shuffle] only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward." JA 29. Such behavior, this Court concluded, "raise[s] a suspicion that the State sought to exclude African-Americans from the jury" and "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." JA 40. This Court also specifically faulted the state court for "apparently ignor[ing]" evidence that the District Attorney's Office had admittedly used jury shuffles for just such a racially discriminatory purpose. *Id.*

But on remand the Fifth Circuit declined to give any weight to the State's discriminatory use of jury shuffles, asserting without analysis that the evidence fails to "overcome" the State's race-neutral explanation for its use of peremptory strikes, and relying inexplicably on the factually incorrect and legally irrelevant proposition that "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." JA 8.[4] The opinion below omits to mention that, on two occasions, the State attempted to use procedural motions to undo defense shuffles that moved (or would otherwise have moved) African-American prospective jurors forward in the seating arrangement.[5] These strategic ma-

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[4] The statement is factually inaccurate because, as both petitioner and the State agreed before this Court and the Fifth Circuit, the prosecution successfully shuffled the jury *three* times. The state shuffled the jury during the first week, at a point when the record does not disclose the racial composition of the panel (*see* JA 113-114), and also during the second and third weeks, at points when the record reveals that "there were a predominant number of African-Americans in the front of the panel" (JA 29; *see also* JA 530 (second week prosecution shuffle of seating array containing seven African-Americans within the first 20 jurors) & 124-129 (third week prosecution shuffle of seating array containing six African-Americans within the first 15 jurors)).

The Fifth Circuit's mention of *petitioner's* use of jury shuffles is legally irrelevant because petitioner's behavior cannot mitigate the State's race-based use of jury shuffles. The only relevant question is whether the State—not petitioner—exercised its jury shuffles in service of a constitutionally impermissible purpose, thereby reflecting a desire to remove African-Americans from the jury based solely on their race. *Cf. Gray* v. *Mississippi*, 481 U.S. 648, 663 (1987) (constitutional harm from improper grant of State's for-cause challenge is not cured by improper denial of earlier State for-cause challenge, because the Court "cannot condone the 'correction' of one error by the commitment of another").

[5] During the third week of voir dire, the prosecution shuffled first, the defense shuffled second, and the prosecution formally objected to the defense shuffle only *after* learning that "African-American prospective jurors had been moved forward." JA 29. During the fourth week, the prosecution declined to shuffle, the defense shuffled, and the prosecution belatedly (and unsuccessfully) argued that it should be allowed to shuffle after observing the results of the defense shuffle. JA 621-622; *see also* Pet. Rep. Br. 14 n.17, *Miller-El I*, No. 01-7662 (U.S. 2002).

neuverings are powerfully probative of an intent to exclude qualified African-Americans from the jury, particularly because both motions were criticized by the trial court at the time as substantively baseless.[6] The Fifth Circuit also failed to acknowledge "testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used [the jury-shuffle] process to manipulate the racial composition of the jury in the past"—evidence the state court refused to consider but that "amplified" this Court's concerns. JA 40, 42.

After mischaracterizing or ignoring critical evidence, the Fifth Circuit then proceeded to consider whether the jury-shuffle evidence could "overcome" the State's explanation for its use of peremptory challenges. JA 8. But, as this Court had already explained, the question is *not* whether each individual piece of evidence can itself "overcome" the proffered race-neutral reasons: the question is whether the cumulative weight of such evidence so erodes the credibility of the prosecution's assertion that race was not a factor that the assertion becomes "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991). Specifically, this Court explained that although the ultimate issue in any *Batson* inquiry is the prosecution's use of peremptory challenges, the jury-shuffle evidence was quite relevant to the intermediate issue of whether the prosecution was preoccupied with keeping African-American jurors off of petitioner's jury. JA 40. Yet the Fifth Circuit simply skipped this intermediate step of the analysis. Indeed, the Fifth Circuit's way of analyzing the case consistently disregards the very process of examining the "cumulative weight" of petitioner's numerous, mutually supportive items and kinds of evidence of racial motivation on the prosecutors' part: it takes up one or another piece of evidence in isolation, concludes that that piece of evidence alone does not overcome the prosecutors' profession of race-neutral justifications, and then passes on to the next.[7]

Had the Fifth Circuit conducted the analysis this Court instructed it to conduct, it would have been compelled to conclude that the "jury-shuffle" evidence adds substantially to petitioner's cumulative showing of racial motivation in the prosecutors' jury selection tactics. The jury-shuffle procedure provides a perfect opportunity for those "'who are of a mind to discriminate,'" *Batson*, 476 U.S. at 96 (quoting *Avery* v. *Georgia*, 345 U.S. 559 (1953)), and here the prosecution used that opportunity to attempt to exclude African-Americans from the jury when it had "no information about the prospective jurors other than their appearance." JA 28.

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[6] The prosecution's stated rationale for its delayed objection to petitioner's jury shuffle in the third week was that the physical shuffling of the cards was not sufficiently vigorous and that the process was conducted in the central jury room rather than the courtroom. JA 124-130. The trial judge denied the motion with the observation that "I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to do it in the manner in which it was done in this case." JA 131. As for the prosecution's untimely assertion in the fourth week that it had the right to shuffle *after* the defense had shuffled, the trial judge noted simply that "[t]he way I've been operating is, to give the State the first opportunity to shuffle and if they accept or object, that's it." JA 622.

[7] *See, e.g.*, JA 8 ("accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect"); *id.* ("Again, Miller-El's circumstantial evidence of jury shuffles does not overcome the race-neutral reasons . . . accepted by the state court . . . ."); JA 16 ("Miller-El has failed to identify any unchallenged non-black venire member similarly situated to the six struck black venire members . . . . *Therefore*, he has failed to demonstrate by clear and convincing evidence that the state court erred in finding the prosecution's reasons for exercising its peremptory challenges credible") (emphasis added). Only once in the court of appeals' opinion is any reference made to a cumulative analysis of the evidence, where—after having taken up each of Miller-El's "areas of evidence" (JA 6), one by one and declared each one insufficient—the court concludes: "In summary, none of the four areas of evidence Miller-El based his appeal on indicate, either collectively or separately, by clear and convincing evidence that the state court erred" (JA 20). Notably, not a single word of analysis is provided to support the "collectively" part of this conclusion, beyond what had earlier been asserted *seriatim* to demonstrate the "separately" part.

In fact, the State has had ample occasion—once before the trial court, twice before the Fifth Circuit, and three times before this Court—to explain its use of jury shuffles on race-neutral grounds, and yet has failed even to *offer* such an explanation. The shuffles thus provide a clear window into the prosecutors' state of mind and forcefully undermine "the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection." JA 40.

III. The Court Of Appeals Failed To Follow This Court's Guidance To Consider The Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans From The Jury.

This Court firmly concluded that the prosecutors had questioned venire members differently based on race and specifically warned that "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." JA 39. This Court criticized the state court's and the Fifth Circuit's "dismissive and strained" interpretation of the record on this central point. JA 38.[8]

Yet on remand, the Fifth Circuit continued to treat dismissively this likely evidence of pretextual strikes. After mischaracterizing or ignoring large parts of the voir dire record as well as petitioner's arguments, and even going so far as to posit facts not contained in the record, the court of appeals concluded that the prosecution's disparate questioning could be adequately explained on the basis of jurors' views

[8] The state trial court found that there had been no disparate questioning (JA 929), and the Fifth Circuit, in denying petitioner's COA, concluded that the state court's findings were "fully supported by the record," JA 38 (quoting JA 1001). But as this Court concluded, "[d]isparate questioning *did* occur" concerning potential jurors' views on the death penalty and on minimum sentencing. *Id.* (emphasis added); *see also* JA 26-28.

on the death penalty and not jurors' race. That conclusion is indefensible.[9]

A. Views On The Death Penalty

For some potential jurors, the prosecutors prefaced questions about the jurors' views on the death penalty with a graphic description of an execution. JA 26-27, 39. This graphic description was used for 53% of African-American jurors (8 out of 15), but for only 6% of white jurors (3 out of 49). JA 39.

The State conceded before this Court that the prosecutors' trial strategy had been to use the graphic script on jurors who had "expressed doubts as to the death penalty on their juror questionnaires" (JA 39), but who were not subject to removal for cause. In other words, the State admitted that its prosecutors had deliberately manipulated the jury-selection process to invent spurious grounds of challenges for cause in order to excuse potential jurors whom they disfavored for reasons that they could not forthrightly disclose without running afoul of the law. *See Witherspoon* v. *Illinois*, 391 U.S. 510, 520-523 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"). Thus, these prosecutors were not above manufacturing pretextual grounds to challenge jurors they wished to eliminate for covert tactical reasons. Yet the State maintained that race was not among the covert reasons the prosecution indulged in choosing jurors to target.

[9] Remarkably, the Fifth Circuit's analysis of the disparate questioning issue consisted almost entirely of passages taken nearly *verbatim* and without attribution from the *dissent* to this Court's opinion (*compare* JA 59-63 (Thomas, J., dissenting) *with* JA 17-20), despite the obvious fact that this Court's majority had plainly already considered and rejected this line of argument.

This Court rejected the State's position, finding that it "cannot be accepted without further inquiry" because "the State's own evidence is inconsistent with that explanation." JA 39. As the Court explained, even by the State's own reckoning, 70% of the African-American jurors who expressed doubts about the death penalty received the graphic script, while only 20% of the white jurors who had expressed similar doubts received that script. *Id.*

Yet on remand, the State offered a nearly identical explanation for its disparate questioning and the Fifth Circuit unquestioningly accepted it, stating that "[t]he record . . . reveals that the disparate questioning of venire members depended upon the member's views on capital punishment and not race." JA 16. Far from conducting the "further inquiry" into the State's justifications that this Court had ordered (JA 39), the Fifth Circuit simply shrugged off—or accepted factually baseless grounds for disparaging—petitioner's abundant showing that the justifications were pretextual.

The Fifth Circuit began its analysis by asserting that "Miller-El contends that" there were ten African-American and ten white jurors who expressed reservations about the death penalty, but that seven of the African-American jurors received the graphic script while only two of the white jurors received this script. JA 17. The Fifth Circuit then stated that, of these ten white jurors, the eight who failed to receive the graphic script "[p]resumably" answered both questionnaire items relating to the death penalty in a manner that unambiguously demonstrated their opposition to the death penalty. JA 17-18.[10] Adopting a theory first offered in Justice Thomas's dissenting opinion, the court hypothesized that these jurors "were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts; in fact, a detailed description may have simply antagonized them and turned them off to the prosecutors." JA 18; *see also* JA 58 (Thomas, J., dissenting).

[10] Question 56 asked, "Do you believe in the death penalty?" and Question 58 asked, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" JA 17.

The Fifth Circuit's hypothetical rationalization of the prosecution's behavior is implausible for at least four reasons. *First*, contrary to the Fifth Circuit's assertion, in that court as well as before this Court it was the *State*, *not* Miller-El, that identified ten white and ten African-American jurors as having expressed reservations about the death penalty.[11] Before the Fifth Circuit, Miller-El identified eight additional white jurors who expressed reservations,[12] meaning that although African-American jurors expressing reservations faced a 70% chance (7 of 10) of getting the graphic script, white jurors expressing similar reservations actually faced only an 11% chance (2 of 18) of getting that script. The Fifth Circuit failed, without explanation, to consider these additional eight jurors as part of its mandated "further inquiry." JA 39.

Second, the Fifth Circuit's findings about the questionnaires of the eight white jurors conceded by the State to have expressed reservations without receiving the graphic script are sheer speculation. As Justice Thomas's dissenting opinion acknowledged, *none of those jurors' questionnaires*

[11] This Court based its conclusion that a COA was warranted on the State's own position regarding the comparability of the ten white and ten African-American jurors because an initial examination of that comparison alone was sufficient to render the State's race-neutral explanation untenable and internally inconsistent. *See* JA 39 (noting that the comparison was based on "the State's calculations"). But the fact that the Court could resolve the issue at that stage of the analysis based on the State's figures in no way excused the Fifth Circuit from considering petitioner's full case on remand.

[12] *See* Reply Br. of Petitioner-Appellant at 6-7 & n.3, *Miller-El* v. *Cockrell*, No. 00-10784 (5th Cir. 2003). In addition to the 10 white jurors identified by the State, white jurors Mazza, Hearn, Vickery, Salsini, Duke, Sohner, Crowson, and Whaley expressed hesitancy. Two of those, Mazza and Hearn, ultimately served on the jury.

were part of the record in this case. JA 59.[13] The Fifth Circuit simply "presum[ed]" that the contents of these questionnaires supported the State's contentions. JA 17-18.[14] But § 2254(d)(2) and (e)(1) require an evaluation of the determinations *actually made* by the state court "in light of the evidence presented in the state-court proceeding." Evidence outside that record—particularly evidence that is only "presumed" to exist—is thus not relevant. In any event, as this Court pointed out, if such evidence had existed, "it cannot be assumed that the State would have refrained from introducing it." JA 39-40 (internal citations and quotation marks omitted).

Third, the Fifth Circuit should not have accepted the State's counterintuitive notion that the prosecution would *avoid* giving the graphic script to jurors who adamantly opposed the death penalty, for fear of offending them. This theory was first suggested in the dissent to this Court's opinion. It was first adopted by the State only on remand. The theory attracted no support among the Justices who formed the majority of this Court and rests on two dubious assumptions: (1) that the two yes-or-no questionnaire items addressing the death penalty would allow the prosecution to distinguish with confidence between jurors merely hesitant about the death penalty and those adamantly opposed to it; and (2) that the prosecution would be concerned about offending the sensibilities of the second category of jurors who could, by definition, be struck for cause.[15] Far more plausible is the State's initial position before this Court (which is additionally more plausible because it *is* the State's initial position)—that a race-neutral prosecutor would give the graphic script to any juror whose questionnaire expressed doubts about the death penalty, whether strong or weak, and whether the juror was white or African-American. JA 39.

[13] Petitioner sought discovery of the remainder of the white jurors' questionnaires in federal district court but was denied access to this information.

[14] The questionnaires represent all the information (besides visual information about race) that the prosecution had about jurors before deciding whether to give the graphic script at the outset of voir dire.

[15] As it turned out, of the eight white jurors who purportedly were adamantly against the death penalty, five were removed for cause, one by agreement, and two based on the prosecution's use of peremptory challenges. JA 18. Thus, the prosecution would have run no risk in offending any of these individuals with the graphic script, since none ultimately served, and might have saved itself two peremptory strikes by giving the graphic script to all eight jurors, possibly eliciting testimony from the final two that would have supported their removal for cause.

Fourth, contrary to the Fifth Circuit's position, the white jurors' subsequent voir dire testimony does not support the suggested inference about their missing questionnaires. For instance, the Fifth Circuit concluded that white jurors Leta Girard, James Holtz, Sheila White, and Joyce Willard (none of whom received the graphic script) were adamantly opposed to the death penalty. JA 18. Yet Girard's voir dire testimony reveals that she failed to answer one of the questionnaire items regarding the death penalty (JA 624)—an omission that, in the case of African-American juror Linda Baker, the Fifth Circuit interpreted as an "ambiguous answer" justifying the prosecution's decision to give her the graphic script (JA 18, 61 & n.11; JL 71). And Holtz, White, and Willard all testified that they supported the death penalty as a matter of principle, but had doubts about whether they could personally bring themselves to the point of imposing it.[16] Moreover, as petitioner pointed out, eight *additional* white jurors expressed some reservations about

[16] White, when asked about the death penalty, stated that "I don't disagree with the law, that there is a death penalty, but for my own self, I cannot in all consciousness, you know, say that someone is guilty and, yes, they should be executed." JA 583. Willard, when asked whether she could sit on a jury giving the death penalty, answered "I don't know if I could. I believe in capital punishment. I don't know if I could be the one to do it, to be on the jury to convict someone. I don't know whether I could or not." JA 665. Holtz indicated that he "believe[d] in the death penalty in the death of a police officer" but could not impose the death penalty outside of the death of a police officer or a contract killing. JA 534-535.

the death penalty yet did not receive the graphic script. *See supra* at 25. At least four (more likely five) of them gave ambiguous answers that, if the Fifth Circuit's theory were valid, should have triggered the graphic script as well.[17] Thus, at least eight or nine white jurors expressed hesitation but not outright opposition to the death penalty, yet did not receive the graphic script. And, conversely, the Fifth Circuit's notion that the two white jurors who expressed some reservations about the death penalty on voir dire and actually received the graphic script may have registered relatively weak opposition to the death penalty in their questionnaire responses is also probably incorrect.[18] Thus, there is little to substantiate and much to undermine the weak support/strong support theory advanced by this Court's dissent and the Fifth Circuit's panel on remand.

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[17] Kevin Duke, Sandra Hearn, and Marie Mazza have questionnaires in the record and all three qualified their "yes" answers to Question 56 in ways that clearly show doubt about whether they would support imposing the death penalty on petitioner. JL 199 (Duke); JL 239 (Hearn); JL 176 (Mazza). Charlotte Whaley's questionnaire is not in the record, but she testified that she answered yes to Question 56 with the qualification "[d]epending on the circumstances." JA 715. Penny Crowson's questionnaire is not in the record, but she testified to uncertainty about her ability to impose the death penalty personally. JA 557.

[18] The Fifth Circuit presumed that white jurors Dominick Desinise and Clara Evans received the graphic script because they "expressed reservations" about the death penalty, but were "unclear" as to the strength of those reservations. JA 17-18. But, even though neither Desinise's nor Evans' questionnaire is part of the record, both testified during voir dire that they answered "No" to question 56, meaning that they did not support the death penalty. JA 573 (Desinise), 627-628 (Evans). Moreover, if the Fifth Circuit's procedure of speculating about jurors' questionnaire responses on the basis of voir dire dialogues were to be indulged, the most probable speculation would be that both of these jurors also answered yes to Question 58, indicating that they could not personally impose the death penalty. On voir dire, Desinise testified that "I can't play God and say that ... I should take [Defendant's] life" (JA 573); Evans testified that "I think probably the only time that I would myself be able to live comfortably after a death penalty that I was responsible for or partially responsible for would be if the prisoner themselves wanted it" (JA 628).

That is particularly the case because the State's strategy towards the 11 African-American jurors whose questionnaires *are* in the record could hardly have been more different than its strategy towards the white jurors. All four of the 11 African-Americans who strongly affirmed that they could impose the death penalty were spared the graphic script, while *all seven* who expressed any doubts or hesitation about the death penalty were given the graphic script. JA 18. The only reasonable explanation for this disparity is that the prosecution intended to elicit testimony that would provide an apparently race-neutral basis for striking these African-American jurors either for cause or peremptorily. And, in fact, six of the seven African-American jurors to receive the graphic script were subsequently peremptorily struck by the State. As this Court explained, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." JA 39. That is precisely what happened.

B. Minimum Sentencing

The prosecutors also questioned potential jurors differently about their willingness to impose the minimum sentence for murder. JA 27-28. Under Texas law at the time of petitioner's trial, an unwillingness to impose the minimum sentence was cause for removal, *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972), and questioning in this regard was a strategy normally used by the defense to "weed out pro-state members of the venire." JA 27.

"[I]ronically," however, the prosecutors in petitioner's trial *themselves* employed this strategy. JA 27. The State conceded before this Court that the prosecutors had employed this acknowledged ruse in order to select a jury more likely to impose the death penalty, but it again maintained that race had not been a factor in deciding which jurors to attempt to disqualify. It is difficult to imagine that the State was asserting by this argument that Macaluso and Nelson—

trained as they were trained, and each found to have violated *Batson* in other prosecutions of the same vintage—relished the prospect of African-American jurors. And it is even more difficult to believe that, if these prosecutors believed African-American jurors to be undesirable, they would have refrained from excusing them by resort to the same disingenuous contrivance that the State now admits they used to accomplish a similarly clandestine purpose. But, in any event, the record refutes that the prosecutors' sole clandestine purpose was the one that the State is now willing to acknowledge.

The record shows that 94% of white jurors were informed of the statutory minimum before being asked whether that was a sentence they could impose, while only 12.4% of African-American jurors were given this information before being quizzed about what they could accept in the way of a minimum sentence for murder. JA 39. As this Court observed, the State proffered "[n]o explanation . . . for the statistical disparity." *Id.* Accordingly, this Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." JA 40.

Yet, reviewing precisely the same record, the Fifth Circuit on remand concluded the opposite: that "[t]he prosecution . . . did not question [white and black] venire members differently concerning their willingness to impose the minimum punishment for the lesser-included offense of murder." JA 19. The court of appeals asserted that the prosecution used the different questioning on the minimum sentence issue only "as an effort to get venire members the prosecution felt to be ambivalent about the death penalty dismissed for cause." *Id.*; *see also* JA 62 (Thomas, J., dissenting) (same).

The Fifth Circuit's conclusion rests on two false factual premises. The first, for which the court gave no supporting record references, is that all seven of the African-American jurors who were subjected to the manipulative form of minimum-sentence questioning were sufficiently opposed to

the death penalty that the State would reasonably want to exclude them from the jury on this ground. JA 19; *see also* JA 62 (Thomas, J., dissenting) (same). This premise is at odds with the Fifth Circuit's simultaneous (and correct) finding that African-American jurors Bozeman, Fields, Warren, and Rand—all of whom were subjected to the manipulative questioning routine regarding minimum punishment—indicated on their questionnaires "that their beliefs would not prevent them from imposing a death sentence." JA 18. The Fifth Circuit reached the latter conclusion in explaining why the State decided *against* giving these four jurors the graphic execution script. *Id.* In fact, as explained in greater detail *infra* at 35-40, each of the four jurors' subsequent voir dire examinations confirms that he or she was at least as capable of imposing the death penalty as several white jurors who were not given the manipulative minimum-sentence script or peremptorily struck. Moreover, jurors Kennedy and Boggess also gave questionnaire answers and testimony indicating that they were at least as capable of imposing the death penalty as the same reference group of white jurors. *See infra* at 37-38, 40. Thus, contrary to the Fifth Circuit's unsupported finding, *six* of the seven African-American jurors who received the manipulative questioning were *not* more opposed to the death penalty than white jurors who did not receive such questioning.

The Fifth Circuit's second false premise, also unsupported by record citations, is that "there are no similarly situated non-black venire members" who should have been given the manipulative questioning routine if the prosecution had been acting in a race-neutral manner. JA 19. This contradicts a specific finding of this Court—namely that there *were* white venire members "who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but were not subjected to manipulative questioning. JA 38, 362-365 (Mazza), 441-444 (Hearn). Moreover, as before, the Fifth Circuit also failed to consider why the State did not use manipulative questioning on the additional eight white jurors identified by petitioner as expressing doubts about the death penalty. In short, the

Fifth Circuit's analysis leaves unexplained the State's failure to use its manipulative questioning routine with the vast majority of white venire members who expressed reservations about the death penalty. JA 39-40; *see also* Pet. Reply Br. 17 n.23, *Miller-El I*, No. 01-7662 (U.S. 2002).

Finally, the Fifth Circuit never even acknowledged, much less accounted for, a fact this Court found highly significant: that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." JA 40. All of these factors—ignored or mischaracterized by the Fifth Circuit—point to the conclusion that the prosecutors sought to exclude the African-American veniremembers based on their race.

IV. The Court Of Appeals Failed To Follow This Court's Guidance In Assessing Whether Any Non-African-American Venire Members Were Situated Similarly To The African-Americans Struck By The State.

This Court found that "[i]n this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. The Fifth Circuit ignored this Court's finding and held, on precisely the same record, that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans. JA 9.

The Fifth Circuit reached this conclusion by systematically discounting or ignoring the portions of the voir dire record that demonstrate the similarities between non-African-Americans accepted by the State and African-Americans struck by the State and by systematically exaggerating the

differences. Much of the Fifth Circuit's discussion of juror comparisons comes verbatim from the State's brief.[19]

Consider, first, the reasons the prosecution gave for striking African-Americans and how those reasons, as this Court found, "pertained just as well to some white jurors who were not challenged." JA 37. Those reasons were ambivalence about the death penalty, hesitancy to impose the death penalty on those who could be rehabilitated, and the criminal history of jurors' family members. JA 38.

1. *Ambivalence about the death penalty.* The State permitted at least three white veniremembers who expressed hesitancy about the death penalty to be seated on the jury. White juror Sandra Hearn did not think "*anyone* should be sentenced to a death penalty on [a] first offense." JA 429 (emphasis added). White juror Marie Mazza hesitated about her ability to impose the death penalty: "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 354. White juror Kevin Duke testified to "mixed emotions" regarding the death penalty, explaining that "it really should be up to [the defendant] whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty . . . ." JA 393. Hearn, Mazza, and Duke, like comparable African-American jurors, later asserted their ability to resolve their doubts in favor of their ability to serve. But, unlike the African-Americans, Hearn, Mazza, and Duke were not peremptorily struck, and all three in fact served on the jury.[20]

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[19] *Compare, e.g.*, JA 9-12 *with* Br. of Respondent-Appellee at 6-13, *Miller-El* v. *Cockrell*, No. 00-10784 (5th Cir. 2003). Consistent with the view that the court of appeals simply relied on the State's brief rather than reviewing the record independently, the court neglected to provide citations for the passages from the record it quoted.

[20] White veniremember Robert Salsini also expressed only qualified support for the death penalty: "I think I could make the decision, you

2. *Hesitation based upon potential rehabilitation.* White juror Hearn stated that her willingness to impose the death penalty depended on whether the defendant could be rehabilitated. JA 429. ("I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense."). White juror Duke also expressed strong views about the virtues of rehabilitation. When questioned about a law that would permit a convicted murderer to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it .... I believe in forgiving." JA 399. As noted above, Hearn and Duke both served on the jury.

3. *Family history of criminality.* The State accepted numerous white jurors whose family members had substantial criminal backgrounds. Noad Vickery testified that his sister had been incarcerated in the state penitentiary. JA 240-41. Cheryl Davis's husband had been convicted of theft. JA 695. Chatta Nix revealed not only that her brother was then on trial as part of a construction scandal, but also that she herself had been "charged with a conspiracy case" related to the scandal. JA 614. Joan Weiner's son had been arrested for shoplifting. JA 590. The State did not strike Vickery, Davis, Nix, or Weiner. It did not even question Vickery, Davis, or Nix about this information, which was on their juror questionnaires.[21]

know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future." JA 593. The prosecution offered no objection to Salsini; the defense later struck him.

[21] JA 220-37; 254-57 (Vickery); JA 596-612 (Nix); JA 678-95 (Davis). The defense used peremptory strikes to remove Nix, Vickery and Davis after the State declined to strike them. Weiner served on petitioner's jury.

The State's acceptance of these white jurors belies its proffered race-neutral rationales for striking the following six African-American jurors, whose views the Fifth Circuit consistently mischaracterized.

Billy Jean Fields. Although you would never know it from reading the Fifth Circuit's opinion, Fields was an ideal State's juror: a conservative, deeply religious, middle-aged family man with deep roots in the community and strong, unflinching law-and-order and pro-death penalty views. *See* JA 173-76; 191-95. Nevertheless, the prosecutors struck Fields and justified the strike by citing his views on rehabilitation, a concern that Fields' Roman Catholic faith would interfere with his application of the death penalty, and Fields' brother's criminal record. JA 196-200. But Fields checked off on his questionnaire that he believed in the death penalty and, to emphasize the point, wrote in that "[i]f you commit the crime pay the [penalty]." JL 14; *see also* JA 174-75 (indicating that Fields saw the death penalty as a deterrent to crime). As the court of appeals noted, Fields did say he believed that nearly everyone was capable of rehabilitation. JA 9-10. But in contrast to white juror Hearn, he made it absolutely clear that he would vote for the death penalty *even* for someone who could be rehabilitated.[22] Thus, Fields' abstract views about rehabilitation had no relevance to his ability to vote for a death sentence. Indeed, the prosecution itself acknowledged the strength of Fields' views by noting on his questionnaire that he had "no reservations" about the death penalty. JL 14.

[22] The prosecution asked Fields whether, if the defendant "indicate[d] to you that he is repentant and has had [a] religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes . . . [and sentence the defendant to death]?" JA 184-85. Fields answered "yes." *Id.* He explained that regardless of the defendant's capacity for rehabilitation, he would nevertheless vote for death, if warranted, based on the "the way the law has been handed down." JA 185.

The State's professed concern that Fields would not be able to impose the death penalty because of the dictates of his Catholic faith is manifestly disingenuous. Fields knew of, and unequivocally disagreed with, his church's stand on the death penalty. JA 174. Fields' faith, in fact, led him *strongly to support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 173-74. Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." *Id.* Moreover, the prosecutors accepted at least three non-African-American Catholics for service on petitioner's jury.[23] The prosecutors never even asked any of these non-African-American jurors about their church's views on capital punishment.

Finally, although his brother's criminal record was noted on Fields' questionnaire (JL 13), the State failed even to raise the issue during its examination of Fields. As noted above, the prosecution did not exercise peremptory strikes against any of the four white jurors with similar family circumstances.

Edwin Rand. The State asserted that it struck Rand because of his ambivalence about the death penalty. JA 290. But Rand expressed no greater hesitancy than white jurors Mazza or Hearn. Rand wrote on his juror questionnaire that he supported the death penalty "depending on [the] crime," and that he thought it was "possibly" appropriate for "all murder." JL 30. During voir dire, he confirmed that he thought the death penalty "could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation."

[23] Mary Sumrow, a white Catholic, was initially seated as the first juror in the case but later excused on medical grounds. JL 147; JA 508, 615-616. Filemon Zablan, an Asian Catholic, was seated as the tenth juror. JL 218; JA 767. Max O'Dell, a white Catholic, was accepted by the State but struck by the defense. JA 788-789.

JA 262; *see also* JA 263-64 (death penalty should be considered for robbery-murder "because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing"). And although Rand expressed some initial uncertainty about his ability to impose the death penalty, he subsequently confirmed that he could serve on a capital jury. JA 266-68.[24] Rand's support for the death penalty was also clear from his affirmative response to the State's query regarding the appropriate *minimum* punishment for *non-capital* murder: "I think I could still go with the death penalty on that." JA 270. The State itself confirmed Rand's readiness to serve, noting the following on his juror questionnaire: "Could be enforced depending upon circums . . . Murd./Robb. – Type of offense think proper for DP . . . 'Yes' -- I can serve." JL 30.[25]

Wayman Kennedy. As with Rand, the State asserted that it struck Kennedy because of hesitancy about the death penalty. JA 349-50. But Kennedy showed no greater reluctance to consider a death sentence than did white jurors Hearn and Mazza. Kennedy expressed no misgivings about imposing the death penalty in murder-robbery cases like this one. Rather, Kennedy explained that, "if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances." JA 324.[26] When asked

[24] The Fifth Circuit noted Rand's comment that the death penalty was a "touchy subject" (JA 11), suggesting that the remark implied unwillingness to vote for a capital sentence But the remark seems better understood as simply a sensible characterization of the state of opinion about the death penalty in our country.

[25] The Fifth Circuit failed to mention any of these statements from Rand's voir dire testimony.

[26] The Fifth Circuit claimed that Kennedy "stated that he believed in the death penalty *only* for mass murders [and] mutilation." JA 12 (emphasis added). Both on his questionnaire and in his voir dire responses, however, Kennedy indicated that mass murder was simply an example of the kind of very serious crime for which he thought a death sentence would be appropriate. *See* JL 46 ("only in extreme cases, *such as* multiple

whether he could give "a yes answer to each of those three [sentencing] questions knowing it would result in the death sentence even though [his] personal feelings were that the man should get a life sentence," Kennedy said that "[i]t would depend on the evidence." JA 324. And he stated that he could answer all the questions affirmatively if he were satisfied that the prosecution had proved its case. JA 325-26.[27]

Roderick Bozeman. To justify striking Bozeman, the State cited his hesitation about the death penalty and his views on rehabilitation. JA 168-69. The record, however, shows that Bozeman favored the death penalty. In his juror questionnaire, he indicated that he supported imposing the death penalty where "the nature of the crime and the circumstances leading up to the crime" warranted it. JL 6. After the prosecution listed the crimes punishable by death in Texas, including murder during a robbery, Bozeman agreed that those were offenses that should make a defendant eligible for the death penalty. JA 150-51. Bozeman was at least as strong a supporter of capital punishment as were white jurors Hearn and Mazza.

Like Hearn, Bozeman stated that he favored the death penalty in cases where there was no way to rehabilitate a person. JA 145-46. But, contrary to the court of appeals' characterization (JA 9), he did not say that such cases were

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murders") (emphasis added); JA 322 ("as I stated briefly on that, mass murder *or something*, yes") (emphasis added).

The Fifth Circuit contended that Kennedy "did not think a murder in the course of a robbery would necessitate the death penalty." JA 12. But, as noted in the text, Kennedy specifically said that some robbery murders warranted a capital sentence. JA 318-19; 323-24.

[27] The Fifth Circuit omitted all these statements from its account of Kennedy's testimony, pulling the sentence, "I think I could" out of context. JA 12. Kennedy immediately added, "It would depend on the evidence." JA 324. Combined with his later clear affirmations that he would answer the special interrogatories in accord with the evidence, regardless of his personal feelings, this statement makes clear that the court of appeals mischaracterized Kennedy's views.

the *only* ones in which he would consider the penalty. And he confirmed that his feelings about rehabilitation would not in any way conflict with his ability to answer the specific questions put to the jury at sentencing. JA 155-56.

Joe Warren. The State claimed it struck Warren because of hesitancy about the death penalty and family members' negative experiences with the law. JA 908-10. But Warren wrote on his juror questionnaire that he believed in the death penalty "[i]n some cases." JL 22; *see also* JA 202 (expressing the view that death penalty might not be appropriate in cases of self-defense). Warren did state that he sometimes felt that if the death penalty is imposed, the condemned person would not really suffer. JA 205-06. But the State accepted white jurors Sandra Jenkins and Kevin Duke, who expressed similar views. JA 542 (Jenkins explaining that "life imprisonment with no parole" was "a harsher treatment" than the death penalty); JA 393-94 (if he had the choice, juror Duke would rather die than be "a useless human being" in prison for the rest of his life).

When explaining why the State struck Warren, the Fifth Circuit stated that he "refused to give a clear answer as to whether or not he could impose the death penalty if the evidence warranted it." JA 14. But the record indicates that Warren provided precisely this clarity on two separate occasions. When the prosecutor explained "three yes answers equal death. Make no mistake about it," and asked Warren "[c]ould you do that," Warren replied "[y]es, I could." JA 207. Later, the prosecutor asked: "Is there any reason why you couldn't answer all three of those questions yes, if we proved that they should be answered yes, knowing that it would result in this man's execution?" and Warren clearly said "[n]o." JA 215-16.

As with juror Fields, although Warren's son's troubles with the law were noted on his questionnaire, the State never even asked Warren about them during its voir dire. *See* JL 20-21. Under questioning from the defense, Warren firmly declared that his relatives' problems would have no effect on his ability to serve. JA 218. Warren is certainly

not distinguished on this basis from Vickery, Davis, Nix, or Weiner—all white jurors accepted by the prosecution.

Carrol Boggess. As with Warren, the State claimed it struck Boggess because of misgivings about the death penalty and a family member with a criminal record. JA 313. But Boggess expressed both support for the death penalty and confidence in her ability to impose it. JA 295-96, 307. Certainly, Boggess expressed no greater concern about the death penalty than white jurors such as Hearn and Mazza. Similarly, the State's professed concern that Boggess had served as a defense witness in a trial involving her nephew is belied both by its failure to mention this during her voir dire and by the numerous white jurors with far greater family—or even personal—connections to criminal proceedings whom the State did not strike.[28]

After reviewing the record, this Court found that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. This circumstance led the Court to hypothesize that these purported race-neutral rationales were "selective and based on racial considerations." JA 38.

[28] With respect to Boggess, the Fifth Circuit stated: "When directly asked whether she could vote for a death sentence, she stated 'I've never been in that situation. I don't feel like I would want to be in that situation and whether I could or not, I'm not real sure.'" JA 12. The court mischaracterizes Boggess' statement, as it was not made in response to a question about the process for imposing the death penalty under the procedure used at the time of petitioner's trial, but rather was a response to a question about the old process where jurors "would go back and actually decide for themselves did the person get the death penalty or should they get a life sentence or should they get [a] number of years . . . [i]f all of them agreed it should be death, they all gave death." JA 298. It was in reference to this discarded process that the prosecutor asked, "[D]o you feel you're the kind of person who could make that kind of decision directly?", and Boggess gave the answer cited by the Fifth Circuit. *Id.* When the actual capital sentencing procedure, which involves answering three statutorily required questions, was explained to Boggess, she said she could answer 'yes' to each one, knowing that such answers would result in a death sentence for the defendant. JA 302.

The Fifth Circuit insisted that the similarities this Court found between the struck African-American jurors and retained white jurors were illusory. But the Fifth Circuit's contentions on this score demonstrably rest on mischaracterizations of the record. Several of those mischaracterizations have been noted above in the descriptions of the African-American venire members. Others occur in the Fifth Circuit's juror comparisons.

The court of appeals claimed that Fields, Bozeman, and Boggess were struck not only because of ambivalence about the death penalty but also because of other characteristics that were unappealing to the prosecution, implying that none of the retained white jurors suffered from more than one defect from the State's point of view. But Hearn not only showed ambivalence about the death penalty; she expressed her belief in the importance of rehabilitation. JA 429. The court of appeals claimed that Warren, Rand, and Kennedy "expressed doubts about whether they personally could impose the death penalty even if the evidence indicated that the death penalty was appropriate" and that "[t]his was not the case with Hearn, Mazza, and Salsini." JA 14. Yet, as demonstrated above, Rand and Kennedy repeatedly made clear that they would vote for death if the evidence supported it.[29]

The court of appeals dismissed the comparability of white venire member Kevin Duke on two grounds, neither of which withstands scrutiny. The Fifth Circuit characterized Duke as having "expressed support for the death penalty"

[29] For Kennedy, *see supra* at 37-38. The prosecutor pressed Rand on precisely this point three times, and Rand answered affirmatively each time. *See* JA 267-68 ("Q: Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes, you can answer those questions yes knowing that the result would be that that man would be executed right down there? A: Yes, I could. Q: You're telling me you can do that? A: Yes.").

and as having said "he could impose it." JA 15. Yet Duke's responses were just the sort of ambivalent statements that earned African-American veniremembers very different characterizations by the Fifth Circuit. Asked whether he believed in the death penalty, Duke answered: "I believe it depends on the circumstances. It's not something to me that has to be done. I have mixed emotions about it because I feel that it really should be up to him whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty, you know." JA 393-94. The State then asked: "What offense do you believe should be punishable by the death penalty, if any?" JA 394. Duke answered with "Murder." But he then added, after another question: "If anything. I wouldn't say that every murder should have the death penalty." *Id.* The Fifth Circuit dismissed Duke's views on rehabilitation as having been expressed "in the context of the availability of parole, not in the context of whether the death penalty was appropriate." JA 15. But there was no reason to think that Duke's strong belief in the rehabilitative potential of all human beings and the importance of "forgiving" those convicted of crimes turned on the category of punishment at issue. Moreover, the Fifth Circuit was simply wrong in claiming that Duke expressed those views only in response to questions about parole. In the context of questions about the death penalty, Duke similarly expressed the view that the commission of a crime, even a very serious one, should not rule out the possibility that a person would act differently in the future. In response to a question about future dangerousness, Duke stated: "there would have to be evidence saying—that I would feel he would do this again or be a threat to society in some *other* way or form. I'm not saying just because I feel that he murdered someone and he was in the process of a robbery and he's guilty of capital murder that he would do it again." JA 396 (emphasis added).

Overall, the Fifth Circuit dismissed the numerous instances and kinds of similarity between African-American jurors whom the prosecution struck and white jurors whom it did not strike by myopically refusing to view any two jurors as comparable unless they shared virtually identical

combinations of attributes, to virtually identical degrees, manifested by virtually identical voir dire colloquies, in every dimension but race. Anything less than precise identity between a stricken black juror and some specific unstricken white juror not only defeated a *Batson* challenge to that strike but also eliminated any probative weight that the strike might have in combination with the striking of 9 (out of 10) *other* black jurors and in combination with the wealth of additional evidence that this Court had already identified as indicative of the potentially pretextual character of the State's purported race-neutral reasons for all of these strikes—*e.g.*, the evidence that the prosecutors were employed and trained in an office long marked by a "culture . . . suffused with bias against African-Americans in jury selection" (JA 41); that they were implicated in acts of discrimination in other cases; that they had racially annotated their juror cards in *this* case; and that they had previously manipulated the jury selection process in *this* case on the basis of race in ways that included a "racially disparate mode of examination" which may itself have produced some of the "divergence in responses" between African-American and white jurors regarding their "reluctance or hesitation to impose capital punishment" (JA 26-27).

Yet, despite this amount of straining to minimize the comparability of the stricken African-American jurors and the unstricken white jurors, the court of appeals could find no distinction between African-American juror Rand, on the one hand, and white jurors Mazza and Hearn, on the other. JA 14.[30] And even one instance of race-based juror exclusion would, of course, violate petitioner's constitutional rights.

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[30] The same was true for the concurring justice the last time this Court considered petitioner's case. *See* JA 47. Even the dissenting justice was forced to concede that there was no basis for distinguishing Rand from Mazza and Hearn. *See* JA 57.

V. THE COURT OF APPEALS FAILED TO ASSESS CRITICALLY THE EXTENT TO WHICH THE STATE TRIAL COURT'S JUDGMENT WAS ENTITLED TO DEFERENCE, AND FAILED TO CONSIDER THE CUMULATIVE WEIGHT OF THE EVIDENCE OF RACIAL DISCRIMINATION.

Running throughout the court of appeals' mishandling of the various categories of petitioner's evidence are two overarching errors of method: (i) a failure to assess critically how shortcomings in the state courts' reasoning undermined the deference to which state-court judgments would otherwise be entitled and (ii) a failure to weigh the evidence of racially discriminatory purpose as a whole. This Court should correct those methodological errors so that other courts will not follow the Fifth Circuit's mistaken lead.

Again and again, the Fifth Circuit refrained from any independent analysis of the state court's finding that the prosecutors' race-neutral reason were genuine. It endorsed the state court's handling of the historical evidence although, as this Court remarked, the state court had not even mentioned that evidence and had inexplicably held that Petitioner failed to establish a prima facie case. JA 42. It dismissed the jury-shuffle evidence because the trial judge had been present during the jury shuffles, although (a) the *Batson* hearing in which the evidence was considered didn't take place until two years later and, "[a]s a result," this Court noted, "was subject to the usual risks of imprecision and distortion from the passage of time" (JA 37); and (b) as this Court also noted, the state trial court "had before it," but did not even acknowledge, a former D.A.'s admission that his office had used jury shuffles to exclude African-Americans on other occasions (JA 40). It adopted the state court's determination that no disparate questioning had occurred (JA 19), although this Court had reached just the opposite conclusion (JA 38). It embraced the state court's comparative juror analysis, although this Court had found that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" (JA 37), and it "accepted without question the state court's evaluation of

the demeanor of the prosecutors and jurors in petitioner's trial" (JA 36), although this Court had cautioned it not to. Altogether, it treated the state court's finding of no discrimination as making the "credibility of the [prosecutors'] reasons . . . self-evident." JA 9.

On habeas review, federal courts defer to state courts' factual findings. But deference must be informed by an assessment of the reasonableness of the state courts' methods of analysis. Blind acceptance, like that practiced by the Fifth Circuit, sets a precedent for turning deference into "abandonment or abdication of judicial review." JA 35.

The Fifth Circuit also set a dangerous example by examining separately each type of evidence and asking whether it *alone* disproved the State's proffered race-neutral explanations. Considered in isolation, the facts that the prosecutors had been trained to exclude minorities from juries and that one of them had been found guilty of discriminatory jury selection at virtually the same time as Petitioner's trial were not enough to undermine the prosecutors' claims. The prosecutors' jury-shuffle behavior, which can support no other possible explanation than racial exclusion, was not enough by itself to call their reasons into question. That the prosecutors deliberately engaged in two forms of manipulative and racially disparate questioning was not enough by itself to discredit their reasons. And that they struck African-Americans who were no more unfavorable than a number of whites the prosecutors left unchallenged was not enough by itself to undermine their pretensions to evenhandedness.

But the issue, as this Court had already explained, is not whether each piece of evidence considered in isolation suffices to "overcome" (JA 8), the race-neutral reasons given by the prosecution. A single piece of evidence rarely does. The issue is whether the cumulative weight of all the evidence so erodes the prosecution's credibility that the prosecution's reasons become "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. at 369. In this case, that cumulative weight was overwhelming.

VI. THIS COURT SHOULD ORDER THAT HABEAS CORPUS RELIEF BE GRANTED.

The record in this case clearly and convincingly demonstrates that the state trial court acted unreasonably in concluding, on the basis of the evidence before it, that the prosecutors in petitioner's case did not purposefully discriminate on the basis of race. *See* 28 U.S.C. § 2254(d)(2) & (e)(1). The trial court's errors were both methodological and substantive, and they show that the court seriously misapprehended both the nature of the evidence of purposeful discrimination and the relevance of that evidence to the *Batson* inquiry.

As a matter of methodology, the state court erred by failing even to *consider* the extraordinary history of racially motivated prosecutorial misconduct in Dallas County or the prosecutors' systematic abuse of the jury-shuffle process—evidence that "casts doubt on the legitimacy of the motives underlying the State's actions" and which this Court has viewed as arousing "concerns," "suspicio[us]," and "credibility" "erod[ing]." JA 40-42. As a substantive matter, the court's errors include its conclusion that no disparate questioning occurred, that petitioner had failed to make out a prima facie case, and that there were no white jurors similarly situated to the African-American jurors that the prosecutors peremptorily struck. The State has declined even to defend the first two conclusions, and this Court firmly rejected the third (JA 37-38).

If the trial court had considered all the relevant evidence described above and made the appropriate threshold determinations—that disparate questioning *did* occur, that the stricken African-Americans had *not* expressed especially strong opposition to the death penalty—it would have been forced to conclude that no explanation other than racial discrimination can adequately account for the prosecutors' behavior in this case. The fact that the state court took every opportunity to avoid having to engage in that inquiry is perhaps the strongest evidence of all that the state court's conclusions are entirely incorrect. If the facts of this case are

not sufficient to make out a clear and convincing *Batson* violation, it seems unlikely that any set of facts could ever be.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and order that habeas corpus relief be granted to petitioner.

Respectfully submitted,

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In The Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. Miller-El Has Failed to Show That the State Courts' Rejection of his *Batson* Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Courts' Finding of No Purposeful Discrimination 7

A. Prosecutors struck prospective jurors based on their views, not on race 7

Carrol Boggess 7

Wayman Kennedy 9

Roderick Bozeman 10

Billie Jean Fields 11

Edwin Rand 14

Joe Warren 15

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State 18

C. Prosecutors did not engage in disparate questioning based on race 27

1. Graphic Script 27

2. Minimum Punishment 32

TABLE OF CONTENTS – Continued

Page

D. The State's use of jury shuffles offers little to rebut the state court finding of no discriminatory motive 36

E. The historical "pattern and practice" evidence offers little to rebut the state court finding of no discriminatory motive 40

II. Alleged Shortcomings in the State Court's Written Findings and Fact-Finding Process Do Not Lessen the Deference Owed to the State Court Adjudication under 28 U.S.C. § 2254(d)(2) & (e)(1) and Do Not Undermine the Reasonableness of That Adjudication 43

III. Miller-El Is Not Entitled to Habeas Corpus Relief 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Chambers v. State, 784 S.W.2d 29 (Tex. Crim. App. 1989) 41, 43, 47

Early v. Packer, 537 U.S. 3 (2002) 45, 49

Ex parte Haliburton, 755 S.W.2d 131 (Tex. Crim. App. 1988) 42

Huffman v. State, 450 S.W.2d 858 (Tex. Crim. App. 1970) 33

Ladd v. State, 3 S.W.2d 547 (Tex. Crim. App. 1999) 36

Latham v. State, 656 S.W.2d 478 (Tex. Crim. App. 1983) 38

Lockyer v. Andrade, 538 U.S. 63 (2003) 48

Miller-El (Dorothy) v. State, 790 S.W.2d 351 (Tex.App. – Dallas 1990) 42, 43

Miller-El v. Texas, 510 U.S. 831 (1993) 4

Purkett v. Elem, 514 U.S. 765 (1995) 48

Stark v. State, 657 S.W.2d 115 (Tex. Crim. App. 1983) 38

State v. Antwine, 743 S.W.2d 51 (Mo. 1987) 46

Swain v. Alabama, 380 U.S. 202 (1965) 2, 3, 44, 46

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 48

Wainwright v. Witt, 469 U.S. 412 (1985) 17

Woodford v. Visciotti, 537 U.S. 19 (2002) 48

Yarborough v. Alvarado, 124 S. Ct. 2140 (2004) 49

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS AND STATUTES

28 U.S.C. § 2254 ..... *passim*

MISCELLANEOUS

Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA") 44

BRIEF OF RESPONDENT

Miller-El claims the State peremptorily struck six veniremen because they were African-American. The State gave race-neutral explanations for the strikes. Thus, under *Batson v. Kentucky*, 476 U.S. 79 (1986), Miller-El had the burden to prove these explanations were a sham and the strikes were the result of purposeful discrimination. The state trial court found that Miller-El did not satisfy this burden.

On federal habeas corpus review, the state court's finding must be presumed correct unless rebutted by clear and convincing evidence. Further, Miller-El is not entitled to habeas relief unless he can show the state court rejection of his claim was based on an unreasonable determination of the facts in light of the evidence. As the court of appeals determined, Miller-El cannot make this showing and he is not entitled to relief.

Miller-El seeks to obscure the issue by focusing on discriminatory practices in other times, in other cases, by other prosecutors. He parses the voir dire record to reach strained comparisons with non-minority jurors. He ignores the realities of jury selection and the innumerable variables that inform the use of peremptory strikes. But the bottom line is the six panelists Miller-El claims were discriminated against each made comments during voir dire that would put any capital prosecutor on notice that they could harbor a bias against the State, regardless of their race. Miller-El has failed to produce clear and convincing evidence that prosecutors purposefully discriminated against them.

STATEMENT OF THE CASE

In the pre-dawn hours of November 16, 1985, Thomas Joe Miller-El and co-defendant Kennard Flowers robbed a Dallas motel at gunpoint. Motel employees Donald Hall and Doug Walker complied with all Miller-El's demands, handing over the cash drawer, opening the combination lock to the bellman's closet, and turning over their own valuable personal property. Miller-El and Flowers then bound and gagged the victims. After Flowers left the scene, Miller-El shot Hall and Walker twice each in the back as they lay face down in the bellman's closet. Hall survived to testify at Miller-El's trial, although Miller-El's shots had severed his spine, rendering him a paraplegic. Walker died on the bellman's closet floor.

Miller-El was indicted for capital murder. Jury selection took place over a span of five weeks in February and March of 1986. During this process, prosecutors peremptorily struck fourteen veniremen, ten of whom were African-American. Miller-El objected to eight of these strikes, asserting that prosecutors were discriminating against African-American veniremen. As to each of these eight, the State proffered its race-neutral, case-related reasons for exercising the challenge. The jury finally selected consisted of two white males, seven white females, an African-American male, a Filipino-American male, and a Latino male.

Miller-El then filed a motion to quash the jury panel based on this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965), arguing that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. At a pretrial hearing on the

motion, Miller-El presented evidence regarding historical jury selection practices in the Dallas County District Attorney's Office. *See* Joint Appendix (JA) 790-884. The trial judge found that there was no evidence presented indicating any systematic exclusion of African-Americans as a matter of policy by the District Attorney's Office and that Miller-El had failed to establish a *Swain* violation. JA 882-83.

The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, this Court issued its opinion in *Batson* holding that an equal protection challenge to use of peremptory challenges could be sustained based on the facts of the case alone, eschewing the *Swain* requirement of proof of a pattern and practice of discrimination.[1] On direct appeal, Miller-El challenged the State's strikes of ten African-American veniremen under the *Batson* standard. The Texas Court of Criminal Appeals remanded the case to the trial court with instructions to conduct a *Batson* hearing. JA 888.

At the *Batson* hearing, conducted on May 10, 1988, the defense relied on the evidence it had presented at the *Swain* hearing. JA 893. The State objected to its admission, arguing that the evidence was irrelevant under

[1] In *Batson*, this Court introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the venireman in question. *Id.* at 97-98. Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98.

Batson since it did not bear on the prosecutors' conduct in Miller-El's case. JA 894. The court overruled the State's objection, however, and admitted the evidence. JA 896. Prosecutors testified regarding their reasons for striking veniremen Paul Bailey and Joe Warren, to which Miller-El had not objected during voir dire, and the State asked the court to take judicial notice of the explanations given during voir dire for its strikes of the remaining veniremen. JA 903-11, 917. The court issued written findings, determining that the prosecution's explanations were race-neutral and negated any inference of purposeful discrimination. JA 924-29.

On appeal, the Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutors' racially neutral reasons and concluded that the prosecutors' explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." JA 930-31. This Court denied certiorari review. *Miller-El v. Texas*, 510 U.S. 831 (1993).

Miller-El advanced his *Batson* claim again in his federal habeas corpus petition, but only as to the six veniremen at issue here. The district court denied relief, concluding that the record supported the trial judge's finding that Miller-El had failed to prove purposeful discrimination. JA 987-92, 966-67. The court of appeals denied Miller-El's request for a certificate of appealability. JA 993.

This Court granted certiorari to review the court of appeals' denial of a COA. 534 U.S. 1122 (2002). In an

opinion issued on February 25, 2003, based on a "threshold examination" of the record, the Court concluded that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and that the court of appeals erred in not granting a COA on the claim. JA 42. The Court remanded the case to determine whether Miller-El could "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." JA 42. Consistent with this directive, the court of appeals granted COA, ordered full briefing on the merits from the parties, and conducted oral argument. Then on February 26, 2004, the court of appeals issued its opinion affirming the district court's denial of relief, concluding that Miller-El had "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." JA 20. The Court has granted certiorari review of this decision. JA 1052.

SUMMARY OF THE ARGUMENT

Miller-El has failed to show that the state courts' rejection of his *Batson* claim is unreasonable. Therefore, he is not entitled to habeas corpus relief. Furthermore, he has failed to rebut, by clear and convincing evidence, the state court finding that prosecutors did not discriminate against African-American veniremen. Each prospective juror peremptorily challenged by the State had voiced views unfavorable to the State. Furthermore, the record reflects that prosecutors treated similarly situated veniremen

equally, examining them based on their individual views and circumstances, not based on their race.

Moreover, neither Miller-El's evidence of historical discrimination in Dallas County nor the prosecutors' jury shuffle conduct in this case refutes the reasonableness of the state court decision. The historical evidence, while potentially relevant to the issue of discriminatory motive, does not implicate the prosecutors involved in Miller-El's trial and in any event does not strike at the genuineness of the prosecutors' reasons for striking prospective jurors, reasons which are amply supported in the record. Likewise, the jury shuffle conduct – assuming it even supports an inference of discriminatory purpose – offers little to overcome the highly persuasive race-neutral explanations for the State's strikes in this case.

Finally, alleged deficiencies in the state fact-finding process, omissions in the written findings, and errors in subsidiary findings – even assuming they exist – do not vitiate the deference mandated by 28 U.S.C. § 2254(d)(2) and (e)(1). The focus of the habeas court's inquiry is the state court's ultimate decision, not its process. But in any event, the "deficiencies" Miller-El points to are illusory and do not impugn the state court's ultimate determination that prosecutors did not discriminate against African-American veniremen.

ARGUMENT

I. Miller-El Has Failed to Show That the State Courts' Rejection of His *Batson* Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Courts' Finding of No Purposeful Discrimination.

A. Prosecutors struck prospective jurors based on their views, not on race.

Miller-El claims that prosecutors purposefully discriminated against six African-American veniremen: Roderick Bozeman, Billie Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy. The State gave race-neutral reasons – multiple reasons in several instances – for each of the strikes. Under *Batson*, Miller-El had the burden of proving that these reasons were pretextual and that the strikes were the result of purposeful discrimination. The state courts reasonably determined that Miller-El failed to satisfy this burden.

Carrol Boggess. Miller-El's argument that the strike exercised against Boggess had no legitimate race-neutral reason is belied by the record. It is certainly reasonable, as happened in this case, for prosecutors to exercise a peremptory strike against a juror who equates imposition of the death penalty with "murder," and, unsurprisingly, indicates she is unsure she could impose the penalty. On her juror questionnaire, Boggess answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Joint Lodging (JL) 44. During individual voir dire, when asked about her views concerning the death penalty, Boggess responded, "Well, I believe I could serve on a case like this, but whether I want to or

not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." JA 295. She also stated, "I'm not saying that I feel like I could impose the sentence myself – or I'm not going to be imposing the sentence, is that correct?" JA 297.

When asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure."[2] JA 298. Boggess further stated, " . . . but now whether or not I could actually go through with *murder* – with killing another person or taking another person's life, I just don't know. I'd have trouble with that." JA 299 (emphasis added). Boggess ultimately indicated that she would answer the special issues according to the evidence, thus insulating herself from a challenge for cause on that basis. Boggess also indicated on her juror questionnaire that she had testified as a defense witness at her nephew's theft trial. JL 43. The State exercised a peremptory challenge to remove Boggess based not on her race, but rather her hesitancy about

[2] Miller-El argues that the court of appeals erred by relying upon this statement because it was given in response to a question by the prosecution whether Boggess could directly vote for the death penalty, as jurors in Texas were once required to do, rather than whether she could answer the special issues that would be submitted in Miller-El's case. *See* Petitioner's Brief at 40 n.28. But Miller-El misses the point. True, Boggess could not be disqualified from jury service for not being able to directly assess a death sentence. But her negative response to the inquiry could nonetheless gauge the degree of her claimed support of the death penalty and indicate to prosecutors that she might be hesitant to answer the special issues in such a way that a death sentence would result.

assessing a death sentence and the fact that she had served as a defense witness in her nephew's theft trial. JA 312-13.

Wayman Kennedy. Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases." JL 51. He echoed that sentiment during individual voir dire: "Well, my feelings are kind of like what I said on the questionnaire, that *I really don't believe in it* only in extreme cases and I would say like a mass murder. Someone broke into this courtroom and killed all of us, I would say yeah, put him to death because that would be a mass murder type situation or in a situation where it was a mutilation, where they come in and cut the body all up or something like that." JA 317-18 (emphasis added).

Kennedy also questioned whether the death penalty could be appropriate punishment for a murder committed in the course of a robbery, the very crime for which Miller-El stood accused: "To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough. . . ." JA 319; *see also* JA 321-22. Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could. . . ." JA 326. The State exercised a peremptory challenge to remove Kennedy because of his hesitancy to assess the death penalty for murder in the course of robbery (for which Miller-El stood accused),[3] his view that the death penalty is only

[3] Miller-El contends that Kennedy "expressed no misgiving about imposing the death penalty in murder-robbery cases *like this one*," implying that the State's concern was unfounded. Petitioner's Brief at

(Continued on following page)

appropriate for mass murder, and the fact that "he hesitated for a great deal of time" before stating that he could answer the special issues according to the evidence. JA 349.

Roderick Bozeman. Bozeman had indicated on his questionnaire that he supported the death penalty and could serve as a juror in a death penalty case. JL 12. But his voir dire examination told a different story. When asked what purpose the death penalty serves, Bozeman responded, "Well, I think *if there's no possible way to rehabilitate a person* and he is harmful to society, you know, the State has that right, I feel." JA 145 (emphasis added); *see also* JA 155. When asked what would indicate to him that an individual was beyond rehabilitation, Bozeman responded, "Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that," and he initially denied that evidence of repeated criminal acts of violence would indicate that a person was beyond rehabilitation. JA 146. Perhaps most significantly, Bozeman *classified himself* as the type of person who believes in the death penalty in principle but who could not actually serve on a capital jury. JA 146-47. He admitted at one point that even if the evidence compelled "yes" answers to the special issues, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. JA 157.

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37 (emphasis added). But the record does not support this statement. Indeed, Texas law forbade the parties from questioning prospective jurors regarding the specific facts of the case. Thus, there was simply no opportunity to determine whether Kennedy's general reluctance to vote for death in murder-robbery cases would apply to *this* murder-robbery case. *See* JA 318

Because Bozeman ultimately averred that he could render a verdict according to the evidence, he was not subject to a challenge for cause despite the pro-defense sentiments he expressed. Thus, the State exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence, and his belief that a prior pattern of conduct would not be sufficient to render a defendant deserving of a death sentence. JA 168. Bozeman's comments put prosecutors on notice that he was an unfavorable juror because of his unusual views on rehabilitation and his doubts regarding his ability to impose the death penalty even if such a result were compelled by the evidence. There is simply no "clear and convincing" evidence that Bozeman's strike was the result of purposeful discrimination.

Billie Jean Fields. Fields stated that he believed in the death penalty and could serve on a capital jury. JA 174-77. Nonetheless, contrary to Miller-El's assertion, he was not an "ideal State's juror." Petitioner's Brief at 35. As reflected both in his questionnaire and in questioning by the State, Fields' brother had served in prison numerous times for drug offenses prosecuted in Dallas County. JL 19, JA 190. Additionally, after noting that the possibility of rehabilitation would be a factor he would consider in assessing a death sentence, JA 182-83, Fields asserted his personal religious belief that *no one* is beyond

rehabilitation.[4] JA 183-84. As Fields concluded, " . . . I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." JA 184. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that Fields' deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence, as well as the fact that his brother had been convicted of a felony. JA 197-99.

Miller-El argues that the prosecutors' reasons for striking Fields are pretextual, but that argument is based in part on two significant factual errors. First, Miller-El claims that "the State failed even to raise the issue [of Fields' brother's criminal background] during its examination of Fields," implying that this omission exposes it as a pretext. *See* Petitioner's Brief at 36. But the record shows that the State did, in fact, question Fields about his brother's criminal past. Such questioning confirmed that

[4] Miller-El characterizes Fields' testimony to indicate he believed "nearly everyone" was capable of rehabilitation. Petitioner's Brief at 35. But the voir dire record belies this characterization:

> Prosecutor: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?
>
> Fields: No.
>
> Prosecutor: You think everyone can be rehabilitated?
>
> Fields: Yes.

JA 183-84.

Fields' brother had been convicted in Dallas County on more than one occasion for possession of a controlled substance and had served time. JA 190. Second, Miller-El contends that "[t]he State's professed concern that Fields would not be able to impose the death penalty because of the dictates of his Catholic faith is manifestly disingenuous" because Fields stated explicitly that he disagreed with his church's opposition to capital punishment. *See* Petitioner's Brief at 36. But the record shows that, in expressing its reasons for striking Fields, *the prosecution made no mention of Fields' Catholic faith*. Rather, Fields' religious-based beliefs regarding *rehabilitation* were cited as reasons for striking him from the panel. JA 197. Therefore, it is Miller-El's argument that is disingenuous.

Miller-El also argues that, because Fields testified he could vote to impose the death penalty even for someone who could be rehabilitated, his "abstract views about rehabilitation had no relevance to his ability to vote for a death sentence." Petitioner's Brief at 35. This argument ignores the sentencing scheme at issue in this case, which queries jurors "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[5] TEX. CODE CRIM. PROC. ANN. art. 37.071 (1986). The jury must answer this question affirmatively for a death sentence to be imposed. *Id.* Therefore, despite Fields' protestation that he could vote for death even for a person he believed had been rehabilitated, it was

[5] Indeed, when asked what he believed this inquiry meant, Fields responded, "Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition." JA 183.

certainly reasonable for prosecutors to be concerned that, if faced with a criminal defendant claiming repentance, Fields would be predisposed to believe him and to answer the future danger inquiry "no." *See* JA 184-85.

Edwin Rand. "[R]ight now I say I can, but tomorrow I might not." That is how venireman Rand responded when asked whether he could vote to impose the death penalty – an inauspicious portent for a prosecutor seeking the ultimate sanction. Based upon this comment alone, it is unsurprising that the State chose to strike him. Yet Miller-El argues that the State had no legitimate reason to strike Rand, thus its strike constituted purposeful discrimination. This argument is not supported by the record.

Rand indicated on his questionnaire that he believed in the death penalty. JL 36. But at the outset of individual voir dire he described capital punishment as a "touchy subject." JA 262. Further into the examination, the prosecutor asked Rand whether he would describe himself as (1) a person who believes in the death penalty and can serve as a juror and assess the death penalty if warranted; (2) a person who believes in the death penalty but for whatever reason cannot actually participate as a juror and be involved in assessing the death penalty; (3) a person who does not believe in the death penalty but could render a verdict according to the evidence; or (4) a person who does not believe in the death penalty and cannot participate as a juror in the assessment of a death sentence. JA 264-65. Rand described himself as falling "[p]robably in between the first two, sitting in the jury and being able to say, 'Okay, he's guilty.' and being able to do that. But again, somewhere along the line, I would probably think to

myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not."[6] JA 265. He later affirmed that he could answer the special issues according to the evidence, thus effectively insulating himself from a challenge for cause. JA 268, 289. The State exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his ability to serve on a capital jury. JA 290.

Miller-El argues that Rand's initial uncertainty about imposing a death sentence cannot be a legitimate basis for the State's strike because Rand "subsequently confirmed that he could serve on a capital jury." Petitioner's Brief at 37. But Rand's subsequent assurance that he could vote to impose death was belied by his own warning to prosecutors: "right now I say I can, *but tomorrow I might not.*" JA 265 (emphasis added).

Joe Warren. Although Warren indicated on his questionnaire that he supported the death penalty "[i]n some cases," JL 28, during voir dire examination, he repeatedly answered questions posed by the prosecutor in a noncommittal manner, indicating ambivalence about the death penalty and his ability to impose it. For example, when asked whether he believed in the death penalty, Warren stated, "there are some cases where I would agree, you know, and there are others that I don't." JA 202.2. When the prosecutor described the crimes defined as

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[6] Miller-El omits this statement from his summary of Rand's voir dire testimony, acknowledging only that Rand "expressed some initial uncertainty about his ability to impose the death penalty." Petitioner's Brief at 37. This omission is notable given that Miller-El accuses the court below of "ignoring the portions of the voir dire record" that do not support the state court holding. Petitioner's Brief at 32, 38.

capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, Warren responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." JA 204. When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." JA 205. In response to the question whether he could make a decision between a life sentence and a death sentence, Warren equivocally replied, "I think I could." JA 207. Likewise, when questioned about his ability to answer the future dangerousness special issue, Warren responded, "I suppose there's always that chance, but there again, you never know." JA 209. Finally, Warren stated, "Well, it's just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice. . . ." JA 211.

The State exercised a peremptory challenge to remove Warren. Notably, Miller-El did not even object to the strike at the time, JA 219, further supporting what is borne out by the record: the State did not strike Warren because he was African-American. At the *Batson* hearing held in the trial court in 1988, the prosecutor specifically cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as bases for his strike. JA 908-11. Miller-El now argues that the State should not be believed because, despite Warren's wavering, he provided clear answers on two occasions. *See* Petitioner's Brief at 39. But two occasions of clarity can hardly override the incertitude that suffused Warren's voir dire testimony as a whole. That a prospective juror at some

point gives a firm answer to a question does not necessarily eradicate a litigant's concern over repeated expressions of indecisiveness throughout voir dire questioning.

Miller-El fails even to acknowledge another factor that played into the prosecution's decision to strike Warren: The fact that Warren was struck relatively early in the jury selection process when the State still had several peremptory challenges remaining.[7] JA 910-11. As the prosecutor observed, an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses: Early in the process, an attorney flush with challenges might feel free to strike a marginal juror; whereas, later in the process, the attorney must be more cautious in expending the precious remaining strikes. JA 914. According to the prosecutor, had Warren been examined when the State had only one strike remaining, the prosecutor would not have exercised a challenge to remove him. JA 910.[8]

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[7] Warren was twenty-eighth of 108 veniremen. JA 135. The State still had nine peremptory challenges remaining after exercising a challenge to remove Warren.

[8] Miller-El does not challenge the State's strikes of the four other African-American veniremen (though he did so in state court). It should be noted, however, that three of the four stated both in their juror questionnaires and during individual voir dire that they were opposed to the death penalty. Mackey (Voir Dire Record (VDR) 10:3949, 3951); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314). Nonetheless, all three were held qualified under *Wainwright v. Witt*, 469 U.S. 412 (1985), based on their statements that they could render a verdict according to the evidence. The fourth expressed ambivalence about the death penalty and indicated both in her questionnaire and during voir dire that she could not personally assess a death sentence. Baker (VDR 8:2990-91, 2996-97, 2998).

In sum, all but one of the challenged veniremen expressed ambivalence or hesitance about the death penalty either in their questionnaires or during voir dire; in some instances, there were additional considerations that informed the State's strikes, such as pro-defense views on rehabilitation and the criminal histories of family members. The one challenged panelist who had expressed no qualms about the death penalty – Billie Jeans Fields – had a brother with an extensive criminal history in Dallas County and had expressed pro-defense views regarding rehabilitation.

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State.

"The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white venireman similarly situated to the six aforementioned African-American veniremen." JA 45. None of the non-minority veniremen who were selected to serve on Miller-El's jury shared views or circumstances comparable to those of the challenged African-American panelists. Miller-El's assertions to the contrary ignore the voir dire record as a whole and the reality of a jury selection process that requires litigants to assess innumerable variables and intangibles in exercising their peremptory challenges.[9]

[9] Significantly, Miller-El's trial counsel did not even attempt to compare the struck African-Americans with non-minority jurors accepted by the State. *See* JA 921. Indeed, several of the white jurors Miller-El now points to, his trial counsel found objectionable from a defense perspective.

When asked about her views on capital punishment during voir dire, white juror Sandra Hearn stated, "I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on first offense." JA 429. Based on this statement, Miller-El claims Hearn held views about capital punishment and rehabilitation comparable to those held by African-Americans struck by the State. Miller-El's contention is based upon the erroneous implied presumption that Hearn's "first offender" comments were considered in a vacuum. The prosecutors knew Miller-El was no first offender. In 1969, he robbed a business at gunpoint, abducting an employee as he fled in the man's car; he was convicted and sentenced to seven years in prison. Statement of Facts (SF) 4:1301-17. In 1976, he masterminded and participated in a bank robbery in which he and a band of cohorts held bank employees at gunpoint; he was convicted of bank larceny and sentenced to ten years in the federal penitentiary. SF 4:1326-28, 1331-54, 1371-73. Miller-El was released on parole in 1981 but was back in prison within months for violating the terms of his parole. SF 4:1382, 1386. Thus, Hearn's views about the inappropriateness of a death sentence for a first offender presented prosecutors no cause for concern in this case.[10]

Moreover, Hearn unequivocally stated in her juror questionnaire and throughout individual voir dire that she believed in the death penalty and could assess the death penalty in an appropriate case. JL 213; JA 429-32, 450-51.

[10] Hearn had made it clear that the prior offense would not have to be a murder, it could be a robbery or some other lesser criminal act of violence. JA 430, 439.

She also stated unequivocally that she could base a death sentence on the facts of the crime and evidence of prior violent crimes.[11] JA 430, 439. She even revealed her personal feeling that the death penalty should be available for not only murder, but also severe torture and extreme child abuse. JA 430, 451. These are hardly the sentiments of a juror prosecutors are likely to strike in a death penalty case.

Hearn's appeal as a prosecution-friendly juror was also based on her statements that she had great respect for police officers because her father was a retired FBI agent and she had daily contact with police officers through her employment. JA 445-46, 449, 457. Certainly, defense counsel recognized that Hearn was a prosecution-prone juror, because *the defense* submitted her for challenge for cause on numerous grounds. JA 482-83. When the trial judge found her qualified, *the defense* objected to her being seated as a juror and asked for additional peremptory challenges. Indeed, in arguing on direct appeal that the trial judge erred in denying that challenge for cause, defense counsel[12] wrote:

[11] In contrast, struck juror Bozeman testified that he did not believe the death penalty should be imposed as long as there was a chance the defendant could be rehabilitated and that evidence of prior violent conduct was not necessarily an indication that a person was beyond rehabilitation. JA 145-46. Bozeman's views were even more extreme than those of Penny Crowson, a white panelist whom the State peremptorily struck. Crowson had expressed a firm belief in the death penalty but also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated. VDR 3:1211.

[12] E. Brice Cunningham, who represented Miller-El at trial, also represented him on direct appeal.

> If ever – if ever – there was a Venireperson that should have been excluded for cause from the Jury in this case, or any capital Murder Jury, it was Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs. . . . Appellant did not have any remaining Peremptory Challenges to use to exclude [] HEARN, who was truly an objectionable and unacceptable juror, from becoming the twelfth juror in Appellant's case. In fact, Appellant probably would have tried it with eleven, without MS. HEARN. Appellant therefore strongly asserts that severe and devastating harm can be clearly shown and established and is evidenced in the Record in this case in denying Appellant's Challenge for Cause to SANDRA HEARN.

JA 1015-16; *see also* JA 1010 ("By no stretch of the imagination could MS. HEARN be considered qualified as a fair juror in this case."). Thus, this same juror whom Miller-El's trial counsel found utterly objectionable from a defense perspective has been transformed by Miller-El's tortured revisionist history of the voir dire record into a *defense-prone* juror the State was remiss for not striking.

Likewise, Marie Mazza's views regarding the death penalty were qualitatively different than those held by the challenged African-Americans. When asked about her feelings concerning the death penalty during voir dire, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony. . . . It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that – a decision that I think I could make one way or the other. . . . Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel

that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 353-54. Nonetheless, Mazza immediately denied that anything in her religion or upbringing conflicted with her support for capital punishment. JA 354. She ultimately revealed that her earlier statement was grounded in concern for what her acquaintances who were opposed to the death penalty would think of her if she served on a capital jury rather than her own internal views regarding the death penalty. JA 354-55. Thereafter, Mazza stated that the death penalty exists for a reason, commenting that murderers gave their victims no mercy. JA 356. In contrast, African-American panelist Warren was so non-committal in his responses to the State's questioning that it is difficult to determine what his views were on the death penalty. JA 202-11. And when asked whether he could impose the death penalty, African-American panelist Rand responded "right now I say I can, but tomorrow I might not." JA 265.

Miller-El also misconstrues the responses of juror Kevin Duke, who expressed clear support for the death penalty and confidence in his ability to assess it in an appropriate case. JA 373, 377-80, 394. Duke stated he believed that the death penalty was necessary and that it served a purpose, specifically deterrence. JA 372-73. He also testified that he had never felt differently, that he had always believed in having the death penalty. JA 373.

According to Miller-El, Duke indicated ambivalence about the death penalty when he commented that "it really should be up to [the defendant] whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty. . . ." *See* Petitioner's Brief at 33 (citing JA 393). But considered in context, these comments reveal merely

that, if *he* were convicted of murder, he would prefer to be executed rather than serve the rest of his life in prison "being a useless human being." JA 393-94; *see also* JA 372 (" . . . I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to me."). Thus, he would allow a criminal defendant to opt for death if faced with the prospect of spending the rest of his life behind bars. These comments simply do not support the proposition that Duke would be at all reluctant to impose death in a given case.

Moreover, Duke's positive views about rehabilitation were made not in the context of testing Duke's ability to assess a capital sentence, but in response to defense counsel's questioning of the juror's ability to disregard the possibility of parole in assessing the minimal allowable sentence (five years) for the lesser-included offense of simple murder.[13] JA 399.[14] In fact, when defense counsel

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[13] It should be noted, however, that Duke also stated, immediately prior to the comment Miller-El refers to, that if he were "governor for the day" he would set the minimum sentence for non-capital murder at five years *without the possibility of parole*. JA 399.

[14] Miller-El also identifies Ronald Salsini as a "similarly situated" juror. *See* Petitioner's Brief at 33-34 n.20. But the record shows that Salsini was a prosecution-friendly panelist, at least in this case. While Salsini did make some comments that could be construed as hesitance about assessing a death sentence in certain circumstances, VDR 5:2249, 2251, 2254, one particular portion of his voir dire clearly set him apart from the challenged veniremen. When asked what types of crimes he felt might warrant a death sentence, Salsini, a former bank teller, volunteered a hypothetical crime that eerily parallels the facts of this case:

> If after [the victim complies with the robber's demands], then a person would shoot them with no real reason or, you know, if there was a threat to the person committing the crime – say he's committing the crime and he's an armed robber and there is no threat to him at all and he stills go

(Continued on following page)

questioned Duke about his views on rehabilitation in the death penalty context, Duke had this to say: "I feel, if he can commit a murder and not have any feelings about it at all, it doesn't bother him, like he said, swatting a fly, no big deal, then I think it doesn't matter. He's going to do it again." JA 396.[15]

Finally, the non-minority veniremen who had family members with criminal backgrounds are clearly distinguishable from those African-Americans whom the State struck on this basis. Significantly, of the four white panelists Miller-El claims were similarly situated and therefore should have been struck by prosecutors, three were so pro-prosecution that they were struck by Miller-El himself.

Noad Vickery testified that his sister had been arrested and had served time in a California penitentiary when he was a teenager. JA 240-41. Vickery was fifty

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ahead and shoots somebody and kills them, that I think should be punished with capital.

VDR 5:2256. The State accepted Salsini as a juror and *the defense* struck him.

[15] Additionally, the record shows the State pursued challenges for cause to remove numerous non-minority panelists who had expressed opposition to or ambivalence concerning the death penalty. VDR 2:663 (Nelson); 2:716-17 (Sohner); 3:1478 (Berk); 4:1696 (Hinson); 5:2101 (White); 8:3153 (Willard). The State secured the excusal by agreement of two additional non-minority veniremen who had expressed opposition or ambivalence. VDR 6:2542, 2575 (Girard); 6:2638 (Evans). Finally, when challenges for cause were unavailing, the State peremptorily struck three non-minority veniremen who had expressed opposition to or ambivalence concerning the death penalty. VDR 2:485, 523 (Gibson); 2:1018-19 (Holtz); 10:3748 (Whaley). Significantly, the State also peremptorily struck a non-minority venire member who had expressed a firm belief in the death penalty but who also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated. VDR 3:1211 (Crowson).

years old at the time of jury selection. JL 65. These circumstances are qualitatively different from those of Billie Jean Fields, whom the State struck partially based on the fact that his brother had multiple felony convictions. First, the incident Vickery related obviously occurred many years before Miller-El's trial, whereas Fields' voir dire indicated his brother's problems with the law were ongoing. Second, Vickery's sister's crime, conviction, and incarceration occurred in California (while Vickery lived in Dallas); Fields' brother had served in prison in Texas for crimes committed in Dallas County, the prosecuting authority in Miller-El's case. Third, Vickery related a single criminal incident regarding his sister; Fields related that his brother had been involved in several crimes. Finally, Vickery was a teenager when the incident involving his sister occurred; Fields was an adult. Further, basic voir dire strategy counseled that, even if the State judged Vickery to be a less-than-ideal juror, given the hostility between Vickery and Miller-El's counsel apparent even on a cold record,[16] there was no need for prosecutors to expend a precious peremptory strike to remove a juror defense counsel surely would seek to remove. In fact, *the defense* submitted Vickery for challenge for cause. JA 254. After the trial judge held that Vickery was qualified, *the defense* exercised a peremptory challenge to remove him from the panel. JA 259. Fields and Vickery were not similarly situated.

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[16] *See, e.g.*, JA 245 (Vickery accuses defense counsel of trying to sway him); JA 252 (Vickery: "I'm sorry that my phrasing of things don't [sic] suit you. . . ."); JA 253 (Vickery: "Well, that's what you said. You said to use that as a judgment and that's what I was using." Defense counsel: "I'm not arguing with you."); JA 259 (defense counsel apologizes for "miscommunication").

The remaining non-minority jurors identified by Miller-El were likewise not similarly situated. Cheryl Davis testified that her husband had been convicted of theft in Dallas County ten years earlier and had received a seven-year probated sentence. VDR 9:3469-70. The balance of her voir dire examination reveals that she was otherwise a strong State's juror. VDR 9:3433-3499. *The defense* submitted Davis for challenge for cause. VDR 9:3478. After the trial judge found Davis qualified, *the defense* exercised a peremptory challenge to remove her from the panel. VDR 9:3491, 3499. Chatta Nix testified that her brother, who owned a construction company, had recently entered into a plea bargain with the United States Attorney's Office for his involvement in a well-known white-collar construction loan scandal. VDR 5:2379-80. Nix, who worked as office manager at her brother's company, had also been named in a separate civil lawsuit along with "thousands of others" filed by the Federal Savings and Loan Insurance Corporation. VDR 5:2380-82. Nix's voir dire examination indicates that she was otherwise a strong State's juror. VDR 5:2345-2399. *The defense* exercised a peremptory challenge to remove her from the panel. VDR 5:2399. Finally, Joan Weiner testified that her ten-year-old son had once been arrested for shoplifting and she had to pick him up at the police station.[17] VDR 5:2141, 2158. However, the record indicates Weiner was a good juror for the State because she had relatives in law enforcement and her support for the death penalty was unequivocal. VDR 5:2110-14, 2139, 2147, 2162. These circumstances are qualitatively different from those of Fields and Boggess.

[17] Weiner served on Miller-El's jury.

C. Prosecutors did not engage in disparate questioning based on race.

The lower court also correctly found unavailing Miller-El's attempt to impute discriminatory intent to the prosecutors from the manner in which they questioned prospective jurors. Miller-El accuses prosecutors of singling out African-Americans for certain lines of questioning intended to elicit responses that would justify their removal from the venire. But this assertion does not survive a careful review of the record.

1. Graphic Script

Of the six African-Americans Miller-El claims were peremptorily struck based on purposeful racial discrimination, only two – Carrol Boggess and Wayman Kennedy – were given the "graphic script"[18] at the outset of their voir dire examination by the State. Boggess had indicated on her juror questionnaire that she believed in the death penalty, but that she held beliefs that would prevent her from returning a death verdict. JL 44. Kennedy had written on his questionnaire that he believed in the death penalty "[o]nly in extreme cases, such as multiple murders." JL 51. Therefore, both Boggess and Kennedy had expressed views on their questionnaires that prosecutors

[18] The State questioned all prospective jurors at length regarding their views on capital punishment. With the vast majority of veniremen, prosecutors simply informed them that the State was actively seeking the death penalty and that affirmative answers by the jury to the three questions submitted at the punishment phase would result in Miller-El being given the death penalty, then asked them an open-ended question concerning their feelings on capital punishment. With some prospective jurors, however, prosecutors described an execution in graphic detail.

could legitimately feel the need to probe through focused questioning.

The four other *Batson* jurors – Bozeman, Fields, Warren, and Rand – all indicated unambiguous support for the death penalty in their questionnaires and thus *did not receive* the graphic script at the outset of their examinations. If, as Miller-El claims, *see* Petitioner's Brief at 29, the prosecutors' motive in employing the graphic script was to push African-Americans to express views that would justify striking them, Bozeman, Fields, Warren, and Rand should have been the principal targets. After all, Boggess and Kennedy had already expressed views that would justify striking them.

Miller-El argues nonetheless that the State's use of the graphic script evinces discriminatory motive because prosecutors used it more often with African-Americans, relying upon the fact that prosecutors used the graphic script with eight of fifteen African-Americans, but with only three of forty-nine non-minority jurors. *See* Petitioner's Brief at 25. These figures, of course, fail to take into account the views of prospective jurors, which the record shows diverged widely along racial lines among prospective jurors summoned in this case. Miller-El counters by asserting that, even taking the prospective jurors' views into account, the graphic script was used more frequently with African-American jurors than with non-minority jurors. To this end, he identifies eighteen non-minority jurors who he contends expressed views sufficient to trigger use of the graphic script had its use been race-neutral. *See* Petitioner's Brief at 25 & n.12. Thus, according to Miller-El, the State used the graphic script with seven of ten African-Americans who expressed hesitancy regarding the death penalty, but with only two

of eighteen like-minded whites. Petitioner's Brief at 25. The fallacy in this analysis, however, is that at the point prosecutors decided whether to use the graphic script with a particular juror, the only indication they had of that juror's views was his questionnaire. But the record in this case contains the questionnaires of only three of the eighteen non-minority jurors Miller-El identifies. As Miller-El himself concedes, arguments based on questionnaires not contained in the record are "sheer speculation." Petitioner's Brief at 25.

Miller-El asserts that this gap in the record is not attributable to him because he sought discovery of the remainder of the white jurors' questionnaires in federal district court "but was denied access to this information." Petitioner's Brief at 26 n.13. In fact, by the time Miller-El made his discovery request, the documents were no longer in existence except for the seated jurors' questionnaires. Miller-El fails to explain why he did not make these documents part of the record *in state court* when the documents were unquestionably in existence and when he carried the burden of proving purposeful discrimination.[19]

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[19] Miller-El attempts to shift the blame to the State, noting this Court's observation on original submission that "[h]ad there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it." JA 35 (internal citations and quotation marks omitted); *see* Petitioner's Brief at 26. But he fails to take into account the fact that he did not advance his disparate questioning arguments in support of his *Batson* claim until federal habeas corpus proceedings, by which time the remaining questionnaires no longer existed. Thus, Miller-El would have this Court hold against the State a failure to introduce evidence to disprove an argument that had not even been made.

In any event, the questionnaires that are part of the record – those of the twelve seated jurors and those of the ten prospective jurors for whom Miller-El originally raised *Batson* objections – support the conclusion that prosecutors used the graphic script to probe the views of prospective jurors who had given ambiguous or conflicting responses concerning their support for the death penalty on their questionnaires. Prosecutors did not generally utilize the graphic script when the panelists' support for *or opposition to* the death penalty was unambiguous.

Again, the four African-Americans who did not receive the graphic script (whose questionnaires are contained in the record) – Bozeman, Fields, Warren, and Rand – all indicated unambiguous support for the death penalty in their questionnaires. They each answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence.[20] *See* JL 12, 20, 28, 36. It was not until subsequent voir dire examination that they expressed reservations.

The African-Americans who did receive the graphic script at the outset of their examinations had given conflicting answers on their questionnaires concerning

[20] The questionnaires submitted to prospective jurors in this case asked the following questions about the death penalty:

56. Do you believe in the death penalty? (yes) (no)
Please explain your answer.

58. Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being? (yes) (no)

JL 44.

their views on the death penalty. On her questionnaire, Carrol Boggess answered question 56 "yes" but also answered question 58 "yes." JL 44. Wayman Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases, such as multiple murders." JL 51. Linda Baker failed to answer question 56 and stated, "[m]y strongest feeling is against the death penalty"; she wrote "undecided" in response to question 58. Defense Exhibit ("DX") 7.[21] Troy Woods circled "no" in response to question 56, but also answered question 58 "no." JL 180. Janice Mackey circled "no" in response to question 56 and added "Thou shall not kill," but then answered question 58 "no." DX 7. In response to question 56, Paul Bailey circled "yes" then wrote in "no," then answered question 58 "no." DX 7. Anna Keaton circled "no" in response to question 56, but then also answered question 58 "no." DX 7.[22]

The seated jurors, whose questionnaires are also part of the record, further support this strategy. All who did not receive the graphic script – Sumrow, Long, Weiner, Mazza, McDowell, Duke, Walsh, Zablan, and Hearn – had answered questions 56 and 58 to indicate unambiguous support for the death penalty.[23] JL 125, 132, 140, 148, 164,

[21] This exhibit may be found in the record of the *Swain* hearing conducted on March 12, 1986.

[22] Jeanette Butler's juror questionnaire is not contained in the record. However, her voir dire examination reveals that while she believed in the death penalty in principle, she was unwilling to participate as a juror in imposing a death sentence. VDR 4:1889.

[23] Miller-El claims that Mazza, Duke, and Hearn made statements on their questionnaires (in explanation of their affirmative answers to question 56) that should have triggered the graphic script. Petitioner's Brief at 28 n.17. Mazza wrote, "Depends on crime – Yes in cases where punishment must be the severest [sic]." JL 148. Duke wrote, "The death

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172, 189, 197, 213. Of the three seated jurors who did receive the graphic script, Gutierrez and Woods had given conflicting answers on their questionnaires concerning their views on the death penalty. JL 205, 180. Indeed, white juror Sztybel was the only juror who had expressed unambiguous support for the death penalty in her questionnaire but was subjected to the graphic script questioning.[24] JL 156. The record simply does not support Miller-El's assertion that prosecutors used the graphic script based on race.

2. Minimum Punishment

Miller-El also accuses the State of questioning African-Americans differently concerning their willingness to

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penalty would be better to me than life in prison, because that is like dieing [sic] every day." JL 172. Hearn wrote, "If a convicted criminal continues to commit crimes after rehabilitation in prison – especially killing people – he is a menace to society and should be disposed of." JL 213. Miller-El ignores the fact that these jurors answered questions 56 and 58 in a manner indicating unambiguous support for the death penalty, unlike the African-American jurors who received the graphic script. Further, these comments are no more provocative than questionnaire comments made by African-American jurors who – like Mazza, Duke, and Hearn – did not receive the graphic script. *See* JL 12, 28, 36.

[24] While the record does not contain the questionnaires of most of the white panelists Miller-El claims should have received the graphic script, their voir dire examinations support the court of appeals' observation that "[t]hey were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts." JA 18. *See* VDR 2:483 (Gibson); 2:603 (Nelson); 2:1016-17 (Holtz); 3:1440-41 (Berk); 4:1646 (Hinson); 5:2053 (White); 6:2520-21 (Girard); 8:3090-91 (Willard). The same holds true for the three death-penalty-opposed African-Americans who did not receive the graphic script. V. Smith (VDR 2:926); Carter (VDR 4:1951-52); Mosley (VDR 7:2654-55).

impose the minimum punishment for the lesser-included offense of murder[25] to create race-neutral reasons for removing African-Americans from the panel. But the record belies this accusation. By the time seven African-Americans were questioned in the challenged manner, they had already expressed views that, while not rendering them subject to a challenge for cause, were unfavorable to the State.[26]

Miller-El contends this line of questioning was racially motivated because it was employed with seven of eight

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[25] With most veniremen, prosecutors identified the minimum penalty first, then asked whether the venire member could impose it. But with some, prosecutors employed a tactic by which they described the offense of murder, then asked what the prospective juror thought the minimum punishment should be, before informing him of the range allowed by law.

[26] Miller-El scoffs at the notion that the State would employ a strategy "normally used by the defense to weed out pro-state members of the venire," Petitioner's Brief at 29 (internal quotation marks omitted), characterizing it as a "disingenuous contrivance. . . . used to accomplish a [] clandestine purpose." *Id.* at 30. *See also id.* at 23 (characterizing graphic script questioning as "covert" tactic). However, at oral argument before this Court on the original submission of the case, counsel for the petitioner conceded that it was "entirely legitimate" for prosecutors to use particular lines of questioning with jurors who had expressed unfavorable views that did not rise to the level of a challenge for cause "to get them to say something that will allow the judge to knock them out for cause" to avoid having to expend a peremptory strike. *Miller-El v. Cockrell*, No. 01-7662, 2002 WL 31415973, at *16-17 (U.S. Oct. 16, 2002).

Further, Texas law allowed the State to challenge prospective jurors on this basis. *See Huffman v. State*, 450 S.W.2d 858, 861-62 (Tex. Crim. App. 1970). And despite Miller-El's description of the tactic as "clandestine," there is nothing in the record to indicate that defense counsel were not fully aware of the State's use of the tactic and the purpose behind it. In any event, the fact that prosecutors employed a "ruse" to attempt to remove unfavorable jurors does not support a finding of purposeful racial discrimination.

African-Americans questioned on the issue, but with only two of thirty-six whites questioned on the issue. However, the record establishes that this disparity is not attributable to race. The record shows that the seven African-Americans who received this line of questioning – Bozeman, Fields, Warren, Rand, Boggess, Kennedy, and Baker[27] – all expressed anti-prosecution views, but were not subject to challenge for cause on that basis. Boggess indicated on her questionnaire that her beliefs would prevent her from voting to impose death, JL 44, and during voir dire examination she characterized an execution as "murder." JA 299. When asked about his views on the death penalty, Kennedy replied, "I really don't believe in it" and stated that he supported it "only in extreme cases" such as those involving mass killings or mutilation. JA 317-18. Bozeman *classified himself* as the type of person who believes in the death penalty in principle but who could not actually serve on a capital jury, JA 146-47, and admitted at one point that he might refuse to answer the punishment special issues according to the evidence in order to avoid imposing death. JA 157. Fields' brother had served in prison numerous times for drug offenses prosecuted in Dallas County, JA 190, and he expressed the view that *no one* is beyond rehabilitation. JA 183-84. Warren was so noncommittal in his responses to the State's questioning that it is difficult to determine what his views were. JA 202-11. When asked whether he could vote to impose death, Rand responded, "right now I say I can, but tomorrow I might not." JA 265.[28] The one African-American who

[27] Miller-El does not challenge the State's peremptory strike of Baker.

[28] Miller-El claims that the court of appeals' finding that these veniremen had expressed anti-prosecution views is "at odds with [its] simultaneous (and correct) finding" that Bozeman, Fields, Warren, and Rand had indicated on their questionnaires unambiguous support for the death penalty, thus explaining the State's decision not to give them the graphic script. *See* Petitioner's Brief at 31. But Miller-El ignores the fact that the prosecution's questioning on minimum sentencing occurred toward the end of its voir dire examination, by which time prosecutors had not only the prospective jurors' questionnaires but also their voir dire responses. Thus, while it is true that the questionnaires of Bozeman, Fields, Warren, and Rand indicated support for the death penalty, their subsequent voir dire examinations revealed pro-defense sentiments.

(Continued on following page)

received the "friendlier" line of questioning was Troy Woods, whose voir dire clearly identified him as an excellent State's juror.

On the other hand, almost all white panelists who had expressed opposition to the death penalty were struck for cause or by agreement of the parties *without the need to resort to this line of questioning*. VDR 2:663 (Nelson); 2:716-17 (Sohner); 3:1478 (Berk); 4:1696 (Hinson); 5:2101 (White); 8:3153 (Willard); 6:2542, 2575 (Girard); 6:2638 (Evans). The two remaining – Gibson and Holtz – were subjected to the same challenged line of questioning and were peremptorily struck, just like Rand, Kennedy, Bozeman, Warren, Boggess, Baker, and Fields. VDR 2:507-11, 2:1046-50.

Miller-El argues that, if the questioning on minimum punishment were race-neutral, white jurors Hearn and Mazza also should have received it. *See* Petitioner's Brief at 31. But because Miller-El has failed to show that these or any other white jurors were similarly situated to the challenged African-Americans, *see supra* at 18-26, the State's failure to question them in the same manner does not give rise to an inference of purposeful discrimination.

As the court of appeals concluded, prosecutors utilized the legitimate tactic of disparate questioning to identify and remove prospective jurors who had expressed views unfavorable to the State. Therefore, Miller-El's arguments of disparate questioning do not serve to rebut the state trial court's finding of no purposeful discrimination in the State's exercise of peremptory challenges.

D. The State's use of jury shuffles offers little to rebut the state court finding of no discriminatory motive.

Miller-El overstates the significance of the State's requests for jury shuffles and mischaracterizes the record in an attempt to portray the State as scheming to manipulate the jury shuffle process to exclude African-Americans. Contrary to Miller-El's assertions, the State's jury shuffle conduct does not support an inference that "the prosecution was preoccupied with keeping African-American jurors off of petitioner's jury." Petitioner's Brief at 20-21.

Miller-El points to the fact that the State twice requested jury shuffles when the record shows a greater number of African-Americans were seated near the front of the jury panel. While this much is true, the record does not support Miller-El's assumption that the prosecutors' requests were intended to exclude African-Americans from the process. Miller-El contends that prosecutors used the jury shuffle "when it had no information about veniremembers other than race." Petitioner's Brief at 12. But this is not the case. Indeed, many race-neutral traits can be discerned from a visual inspection of a jury panel. *See Ladd v. State*, 3 S.W.2d 547, 563-64 (Tex. Crim. App. 1999) (noting validity of various race-neutral reasons for State's jury shuffle request, including facts that first group

included more individuals with criminal histories (according to records), first group did not include as many individuals wearing coats and ties and did not include as many elderly professional people, and first group included probation officer prosecutor recognized and did not want to offend by striking).

Miller-El also argues that "on two occasions, the State attempted to use procedural motions to undo defense shuffles that moved . . . African-American prospective jurors forward in the seating arrangement." Petitioner's Brief at 19. But he mischaracterizes the record as to each instance.

First, Miller-El complains about the State's objection to a defense shuffle during the third week of jury selection, asserting that "the prosecution formally objected to the defense shuffle only after learning that African-American prospective jurors had been moved forward." Petitioner's Brief at 19 n.5 (internal quotations omitted). The record shows that the State requested and received a shuffle, to which the defense did not object, then the defense requested and received a shuffle. During defense counsel's shuffle in the central jury room, the prosecutor protested, claiming that defense counsel had not shuffled the juror cards thoroughly enough.[29] JA 125, 128. Defense counsel suggested that the prosecutor take it up with the judge. JA 124, 126, 128. After the shuffles were completed, but

[29] During the first three weeks of jury selection, the jury shuffles were conducted in the central jury room without the trial judge present, pursuant to an agreement between the parties consistent with Dallas County practice. Counsel for the State physically conducted the State's shuffles, and counsel for the defense physically conducted the defense's shuffles.

before the newly shuffled venire was reseated, counsel for both the State and the defense went to the judge's chambers; the prosecutor informed the judge that he had a problem with the way the defense had conducted its shuffle, but that he was still investigating the issue. JA 126-27. He lodged no formal objection at that time. JA 127. The panel was seated, then the judge excused the last sixteen jurors to return to the central jury room, conducted some general voir dire, distributed questionnaires, and recessed the panel for lunch. JA 127. At that point, armed with charts prepared by an investigator indicating the minimal amount of shuffling that had occurred as a result of the defense's shuffle, the State formally objected to the defense's shuffle, asking that the panel be either reshuffled or quashed; the prosecutors, in accordance with state law, essentially argued that when the State protested the manner in which defense counsel conducted his shuffle, the parties' agreement to conduct shuffles outside the courtroom terminated.[30] JA 130. Defense counsel charged that the State's objection was racially motivated. JA 129. But, as the prosecutor noted, he had voiced his complaint during the defense's shuffle, before he had even seen the array or knew in what order the veniremen would be seated. JA 129. The trial judge denied the State's request to reshuffle or quash the panel, finding that the State had failed to object to the defense's shuffle in a timely manner. JA 131-32. The State's objection was to the mechanics of the defense's shuffle, not its result. Therefore, it does not support an inference of discriminatory purpose.

[30] *See Latham v. State*, 656 S.W.2d 478, 480 (Tex. Crim. App. 1983); *Stark v. State*, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983).

Second, Miller-El complains about an instance during the fourth week of jury selection. The prosecution had declined to shuffle, then the defense requested and was granted a shuffle. The prosecution then objected to not having the opportunity to exercise its right to a shuffle after seeing the results of the defense's shuffle. JA 621-22. But contrary to Miller-El's assertions, *see* Petitioner's Brief at 19, the record does not reflect the racial composition of the panel either before or after the defense's shuffle. Thus, once again, there is simply no basis to infer discriminatory motive from the State's objection.

Miller-El finally asserts that the Dallas County District Attorney's Office has admitted to using jury shuffles to manipulate the racial composition of juries. *See* Petitioner's Brief at 18, 20. This assertion is apparently based on the testimony of a Dallas County judge that he had once presided over a voir dire proceeding during which a prosecutor (not involved in Miller-El's trial) volunteered that he requested a jury shuffle because a large number of African-Americans were seated near the front of the panel. JA 858-59. Even if this testimony can be construed as an "admission" by the Dallas County District Attorney's Office, the fact that a single unnamed prosecutor not involved in Miller-El's trial used the jury shuffle in a discriminatory manner in another case has little bearing on whether the prosecutors in Miller-El's case acted likewise. In any event, any inference that can be drawn from such evidence cannot overcome the highly persuasive race-neutral explanations

for the State's strikes, explanations which are supported by the record and were credited by the state court.[31]

E. The historical "pattern and practice" evidence offers little to rebut the state court finding of no discriminatory motive.

Unsurprisingly, Miller-El seeks to focus this Court's attention on evidence of past discriminatory practices by the Dallas County District Attorney's Office and of practices by other prosecutors in other cases.[32] The inquiry at *Batson*'s third step, however, is whether the prosecution exercised its peremptory challenges based on race in this case.

The court of appeals did not, as Miller-El contends, discount the relevance of the historical "pattern and practice" evidence presented by Miller-El in state court in

[31] Miller-El complains that the court of appeals failed to engage in a "cumulative analysis" of the evidence presented in support of his claim of purposeful discrimination, *see* Petitioner's Brief at 20-21 & n.7, but a review of the court of appeals' opinion belies the complaint. Though the court of appeals did take each category of evidence in turn to describe it and analyze its import, it concluded ultimately that "none of the four areas of evidence Miller-El based his appeal on indicate, *either collectively or separately*, by clear and convincing evidence that the state court erred." JA 20 (emphasis added). *See also Early v. Packer*, 537 U.S. 3, 9 (2002) (rejecting court of appeals' conclusion that state court had failed to assess cumulative impact of evidence supporting claim, noting that compliance with such requirement "does not demand a formulary statement that [evidence was considered] 'individually and cumulative.' It suffices that that was the fair import of the Court of Appeals' opinion.").

[32] A detailed recitation of the evidence of historical practices presented at the pretrial *Swain* hearing is set forth in respondent's brief on the merits in *Miller-El v. Cockrell*, Res. Br. 23-27, No. 01-7662 (U.S. 2002).

support of his prima facie case. *See* Petitioner's Brief at 15. Indeed, the court below described the evidence presented and noted that "the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable." JA 7. The court specifically acknowledged, consistent with this Court's directive, that "[t]his historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons." JA 8. It concluded nonetheless that "the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect." JA 8.

Further, the "evidence" Miller-El cites "about policies in place in the D.A.'s office *at the time of petitioner's trial* and evidence about the practices of *the very prosecutors* in petitioner's case" was not even before the state trial judge and thus may not be considered on federal habeas corpus review. Petitioner's Brief at 17 (emphasis in original). *See* 28 U.S.C. § 2254(d)(2) (limiting federal habeas court's review to discerning whether state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

Miller-El claims that "both prosecutors involved in [his] jury selection . . . were personally implicated in the Dallas D.A.'s Office's history of racial discrimination," relying upon two state court opinions reversing convictions based on *Batson*. *See* Petitioner's Brief at 15-16 (citing *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989);

(Dorothy) Miller-El v. State, 790 S.W.2d 351 (Tex. App. – Dallas 1990)). But these opinions, which were issued in 1989 and 1990, were clearly not before the trial court either at the *Swain* hearing in 1986 or at the *Batson* hearing in 1988. For his proposition that "[t]he Sparling manual served as a training tool into the 1980s," Miller-El relies upon a recitation of testimony from a state court opinion in another case, also not before the trial judge, which in fact is in conflict with testimony presented in Miller-El's case that the paper was removed from the manual prior to 1977. *See* JA 774. *See* Petitioner's Brief at 15-16 n.2 (citing *Ex parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988)).[33] Because these opinions were not part of "the evidence presented in the State court proceeding," and in fact did not even exist when the trial court made its determination, they are irrelevant to the federal habeas inquiry.[34]

But even if the opinions were properly before the trial court, they would not impeach the trial judge's decision. Any inference that may be drawn from the mere fact that a prosecutor was involved in a single case, among hundreds he tried, that was reversed under *Batson* is insufficient to overcome the trial judge's finding that the State did not discriminate in this case. To the extent these opinions indicate that these prosecutors discriminated

[33] Even according to *Haliburton*, the Sparling article was last seen in the training manual around 1979 to 1981, more than five years before Miller-El's trial. 755 S.W.2d at 133 n.4.

[34] Also not before the state trial judge were the *Dallas Morning News* articles and a 1963 treatise on jury selection. *See* Petitioner's Brief at 13-14 n.1, 15-15 n.2. The March 9 article was offered at the *Swain* hearing but was excluded as hearsay. JA 823-24, 876-79. Neither the December 21 article nor the 1963 treatise were offered.

against African-Americans in another case,[35] the opinions do little to prove that they did likewise in Miller-El's case, particularly in light of the undisputed race-neutral, case-related reasons for the strikes in this case.

II. Alleged Shortcomings in the State Court's Written Findings and Fact-Finding Process Do Not Lessen the Deference Owed to the State Court Adjudication under 28 U.S.C. § 2254(d)(2) & (e)(1), and Do Not Undermine the Reasonableness of That Adjudication.

Throughout his brief, Miller-El points to alleged deficiencies in the state court written findings and fact-finding process. He ultimately contends that, while a state court's finding of no discrimination must ordinarily be deferred to on federal habeas review, that deference "must be informed by an assessment of the reasonableness of the state courts' methods of analysis." Petitioner's Brief at 45. But this contention finds no support in 28 U.S.C. § 2254.

Section 2254(e)(1) erects a presumption of correctness for state court fact findings and provides that a petitioner has the burden of rebutting that presumption by clear and convincing evidence. Section 2254(d) provides in pertinent part that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State

[35] It should be noted, however, that in *Chambers*, prosecutor Paul Macaluso was found responsible for striking only one of three African-Americans struck by the State. 784 S.W.2d at 31-32. Likewise, the opinion in *(Dorothy) Miller-El* cited by Miller-El does not even reflect that Jim Nelson was involved in the case. 790 S.W.2d at 354-356. The record of that trial indicates that Nelson was lead prosecutor at Dorothy Miller-El's trial, but another prosecutor, Bruce Isaacks, was responsible for jury selection.

court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The focus is on the state court's ultimate determination, not the process used to arrive at that determination or the form of the state court opinion.[36] Thus, the inquiry under § 2254(d) is not focused upon the state court's fact-finding process or the level of detail in its written findings – or even error in its subsidiary findings. Rather, the question under § 2254(d) is whether the determination itself is unreasonable.

In any event, the "shortcomings" alleged by Miller-El do not undermine the state court's ultimate determination that prosecutors did not discriminate against African-American jurors. Miller-El points out the fact that the state trial judge did not specifically mention the historical "pattern and practice" evidence in his findings. Petitioner's Brief at 44. However, the record belies any contention that the trial judge failed to consider all the evidence properly before him, including the pattern and practice evidence admitted at the *Swain* hearing. At the *Batson* hearing, the trial judge admitted into evidence, over the State's objection on relevancy grounds, the Sparling paper and all the testimony regarding historical jury selection practices in Dallas County originally admitted at the *Swain* hearing. The mere fact that the trial judge did not specifically mention this evidence in his written findings is not a

[36] Notably, the pre-AEDPA version of § 2254(d) did contain a full and fair hearing requirement as a prerequisite to application of the presumption of correctness afforded state court fact findings. 28 U.S.C. § 2254(d) (1994) (repealed 1996). But the 1996 amendments eliminated all references to a "full and fair hearing."

sufficient basis to assume that the trial judge did not consider the evidence. *See* JA 42 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it."). *See also Early v. Packer*, 537 U.S. 3, 8 (2002) (rejecting court of appeals' conclusion that failure to cite Supreme Court authority rendered state court decision unreasonable). The trial judge apparently determined nonetheless (and reasonably so) that such circumstantial evidence of discriminatory intent, which had no direct bearing on the actions of prosecutors in this case, was insufficient to prove purposeful discrimination in the face of the race-neutral, case-related reasons for the prosecutors' strikes in this case.

Miller-El also faults the state trial court's determination that Miller-El had failed to establish a prima facie case under *Batson*. *See* Petitioner's Brief at 44. However, the trial judge's findings themselves explain this seemingly insupportable determination: The finding of no prima facie showing was based not only on Miller-El's evidence but also on "the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective *Batson* hearing." JA 927. The judge explained that his analysis was based on then-existing lower court precedent interpreting the *Batson* decision, which counseled that *Batson* "requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination *as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.*" JA 927-28

(quoting *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987)) (emphasis added). Thus, the trial judge essentially collapsed *Batson*'s first step of determining whether Miller-El had made a prima facie showing into *Batson*'s third step of determining whether Miller-El had proved purposeful discrimination. While the trial judge undoubtedly erred as a matter of law in doing so,[37] this legal error (based on then existing precedent) does not in any way cast doubt on his ul imate determination that Miller-El failed to prove purposeful discrimination.

Miller-El complains also that the court of appeals failed to acknowledge the two-year delay between voir dire and the *Batson* hearing. Petitioner's Brief at 44-45. However, under the facts of this case, that delay does not necessarily impugn the trial court's credibility determinations. As this Court noted, prosecutors proffered their race-neutral reasons for all but one of the challenged strikes contemporaneous with the strikes. JA 37. Though at the time of voir dire, *Swain* did not *require* the trial judge to engage in the three-step analysis later espoused in *Batson,* the record in this case shows that the trial judge did in fact assess the prosecutors' credibility (as required in *Batson*'s third step) contemporaneous with and in the context of the voir dire process.[38] Indeed, at the

[37] It should be noted, however, that *Batson* itself counseled that "[i]n deciding whether the defendant has made the requisite [prima facie] showing, the trial court should consider *all relevant circumstances*." 476 U.S. at 96 (emphasis added); *see also id.* at 94 (noting that a defendant makes out a prima facie case "by showing that *the totality of the relevant facts* gives rise to an inference of discriminatory purpose") (emphasis added).

[38] As the trial judge noted at the pretrial *Swain* hearing conducted *immediately after* jury selection in this case, "And the State, as I recall, on every single strike where it was challenged by the Defense they

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subsequent *Batson* hearing, the State merely asked that the trial judge (the same trial judge who had presided over the voir dire) take judicial notice of that prior testimony. JA 917. This case therefore stands in marked contrast to other cases tried during the same time period in which prosecutors were not required to proffer their reasons for strikes until years after the voir dire at issue took place. *See, e.g., Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989).

Finally, Miller-El faults the state trial court for finding no disparate questioning. *See* Petitioner's Brief at 44. Significantly, however, Miller-El did not advance his disparate questioning argument in support of his *Batson* claim until federal habeas proceedings. Nonetheless, the state trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that "no disparate prosecutorial examination of any of the veniremen in question has been shown." JA 929. This finding is properly interpreted, in context, as a finding that Miller-El had shown no disparate questioning *based on race*. Obviously, prosecutors did not use the same script of questions with all prospective jurors regardless of the views reflected in their questionnaires and voir dire responses. The trial judge was certainly aware of this but found, nonetheless, that Miller-El had failed to show disparate questioning based on race.[39]

stated to the satisfaction of the Court at least, that the reason for striking a particular juror was not racially motivated." JA 805-06. *See also* JA 892 ("I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination. . . .").

[39] This interpretation is further supported by the fact that the State acknowledged *before the state trial judge* that it had used

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Miller-El's complaint against the state court finding here is analogous to an issue presented to the Court in *Woodford v. Visciotti*, 537 U.S. 19 (2002). There, the Court determined that the court of appeals' "readiness to attribute error" based on the state court's use of a "shorthand reference" to the applicable standard was "inconsistent with the presumption that state courts know and follow the law" and incompatible with § 2254, "which demands that state-court decision be given the benefit of the doubt." *Id.* at 23-24. Similarly, the state court's finding that "no disparate prosecutorial examination of any of the veniremen in question has been shown," while imprecise, does not render unreasonable the state court's finding of no purposeful discrimination.

III. Miller-El Is Not Entitled to Habeas Corpus Relief.

Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 252-56); *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Because Miller-El failed to satisfy his burden of proving purposeful discrimination, the trial judge found that the prosecutors did not act with discriminatory purpose.

On habeas review, "[i]t is not enough that a federal habeas court . . . is left with a firm conviction that the state court was erroneous." *Lockyer v. Andrade*, 538 U.S.

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different lines of questioning with different jurors, but that this was based on the jurors' views, not their race. JA 920-21.

63, 75 (2003) (internal citations and quotation marks omitted). Further, "the range of reasonable judgment can depend in part on the nature of the relevant rule. . . . The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004). Like the "in custody" requirement considered by the Court in *Alvarado, Batson* is a general rule calling for an overall objective assessment of many different facts supporting both sides. *Id.* at 2149-50. Though Miller-El asserts, notwithstanding the state court's contrary conclusion, that discrimination took place, "it is at least reasonable to conclude that [it did] not, which means that the state court's determination to that effect must stand." *Early v. Packer*, 537 U.S. at 11. As the lower court held, Miller-El has failed to demonstrate that the state court finding of no purposeful discrimination is unreasonable in light of the record, and has likewise failed to rebut the finding by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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No. 03-9659

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
1. An entrenched practice of deliberate racial exclusion.	2
2. The jury shuffles.	4
3. Disparate questioning.	8
4. Juror comparisons.	12
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

	Page(s)
Batson v. *Kentucky*, 476 U.S. 79 (1986)	1, 8
Huffman v. *State*, 450 S.W.2d 858 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972)	11
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981)	19

STATUTES

28 U.S.C. § 2254(d)(2)	3

INTRODUCTION

The State's brief is written as if this case—and this very same record—had not been the subject of a studied opinion by this Court just last year. The State ignores equally this Court's detailed modeling of the proper method for analyzing each part of the present record under the legal rules of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and the Fifth Circuit's many deviations from that model. Purporting to defend the correctness of the trial court's decision, the State fails even to acknowledge the many errors this Court already identified in that court's handling of the case.

Instead, the State proceeds as if it is enough to show that each individual aspect of the prosecution's conduct, viewed in isolation, can conceivably be explained on race-neutral grounds. In many instances, the State fails to do even that. But the more fundamental flaw in the State's approach is to lose sight of the requirement, emphasized by this Court, that the habeas court consider the cumulative weight of *all* the evidence of racial discrimination.

Here, the weight of that evidence is simply overwhelming. The statistical patterns alone, as this Court recognized, are stark: 91% of eligible African-Americans, but only 13% of whites, were peremptorily struck by the prosecution. The import of those lopsided numbers becomes even more clear when one considers the Dallas County D.A.'s Office's decades-long policy of openly inculcating its attorneys to eliminate minority members from juries. And the prosecutors in petitioner's case learned those lessons well. It is difficult to imagine anything but a racially discriminatory motive behind their efforts to use so-called jury shuffles to keep African-Americans from being considered for petitioner's jury. Nor can one discern anything but a racially discriminatory purpose for the contrived strategies of questioning that the prosecutors used to target African-American members of petitioner's venire, searching for trumped-up grounds to knock them out of consideration. Finally, there is the fact, also already recognized by this Court, that the excuses offered by the prosecution for its strikes against African-

Americans apply equally well to a number of white jurors whom the prosecution was happy to retain. Nearly as telling as the juror comparisons themselves are the contrivances the State must adopt to claim that the record does not support the similarities between struck African-Americans and retained whites noted by this Court. Considering this wealth of evidence, the prosecutors' peremptory strikes of 10 of the 11 qualified African-Americans in petitioner's venire simply cannot reasonably be believed to have been untainted by racial prejudice.

ARGUMENT

1. ***An entrenched practice of deliberate racial exclusion.*** This Court concluded that the abundant evidence of a longstanding practice of race discrimination in jury selection by the D.A.'s Office, up through the time of petitioner's trial, showed that "the culture of the . . . office was suffused with bias against African-Americans in jury selection." JA 41.[1] This Court emphasized that this evidence was clearly relevant to the ultimate determination whether to credit the prosecutors' purported race-neutral reasons for their racially disproportionate peremptory strikes. *Id.*

The State now resorts to obfuscation and misstatement in an effort to avoid the implications of this evidence for any fair assessment of the prosecutors' actions.[2] According to the State (Br. 6), "[t]he historical evidence . . . does not implicate the prosecutors involved in Miller-El's trial." But in fact the record shows that the prosecutors *in petitioner's*

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[1] Moreover, this Court found that African-Americans in Dallas County "almost categorically were excluded from jury service." *Id.*

[2] Unable to respond to the substance of this powerful contextual evidence, the State attempts to avert the Court's eyes from it on procedural grounds. While those efforts themselves reflect the weakness of the State's position, they are also unfounded. For example, contrary to the State's assertion (*see* Br. 42 n.34), the *Dallas Morning News* articles providing detailed statistical studies of race discrimination in jury selection by the D.A.'s Office *were* in evidence at the *Batson* hearing (JA 895, 1018-1051). *See also infra* n.3.

case had been trained during the long period when the D.A.'s Office explicitly taught its lawyers to use race in selecting juries. Pet. Br. 15-17. The record also shows that the prosecutors *in petitioner's case* had been caught using the same racially discriminatory tactics at virtually the same time as petitioner's trial, and as a result death sentences in those cases were set aside under *Batson*. *Id.*[3]

When these very prosecutors in this case used peremptory strikes in a statistically highly disparate way, questioned jurors in a highly disparate way, used jury shuffles that can only be understood as intended to change the racial composition of the relevant portion of the venire, and accepted white jurors with strengths and potential liabilities remarkably similar to those of black jurors they struck, it strains credulity—indeed it defies reasonable belief—to argue that race played no role in their peremptory challenges.

The State also misleadingly suggests (Br. 40-41) that the Fifth Circuit took account of the historical evidence and weighed it in conjunction with all the other evidence in reaching its conclusion that race did not play a significant role in any of the prosecution's peremptory strikes. But the State's position cannot be squared with the plain language of the Fifth Circuit's opinion. The court of appeals discounted

[3] The State contends (Br. 41-42) that the evidence connecting these prosecutors to the Office's long history of systematically excluding African Americans from juries was not properly before the state courts. Wholly apart from the offensiveness of arguing that there is no evidence of discriminatory conduct by these prosecutors in the face of reported judicial decisions, the State's contention is wrong. The fact that the D.A.'s Office's manuals advocated the discriminatory tactics used here was indeed before the trial court. JA 807-812. And the decisions finding *Batson* violations by petitioner's prosecutors in nearly contemporaneous cases had been handed down *before* the state appellate court considered petitioner's *Batson* claim. As a matter of precedent and judicial notice, then, those findings were before the state courts when the final *Batson* determination in petitioner's case was made. They are thus part of the "evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), properly considered when deciding whether the state courts' determination was unreasonable.

the significance of the pattern and practice evidence with the legally irrelevant explanation that petitioner had "already met the burden under the first step of *Batson*." *Compare* JA 8 *with* JA 41. And rather than weighing that evidence together with the rest of petitioner's evidence, the court assessed it in isolation. The state court's finding of no discrimination must be presumed correct, the Fifth Circuit explained, "*and accordingly* the general historical evidence does not *prove* by clear and convincing evidence that the state court's finding ... was incorrect." *Id.* (emphases added). Only if the court of appeals considered the pattern and practice evidence in isolation would it require that evidence alone to confront the deference normally owed the state court's findings and to prove the state court incorrect on its own.

Because a "culture ... suffused with bias against African-Americans in jury selection" (JA 41) is the context for the actions of these prosecutors and this case, the rationalizations of neither the court of appeals nor the state trial court can stand.[4] When such prosecutors from such an office exclude virtually all African-Americans from a capital jury in the statistically and quantifiably biased fashion manifest here, no reasonable court can blink away the compelling inference of discrimination by looking at the culture of bias with only one eye and looking at the mathematics showing bias only with the other.

2. ***The jury shuffles.*** This Court concluded that the prosecution's misuses of the jury shuffle process "raise a suspicion that the State sought to exclude African-Americans from the jury" and "tend[] to erode the credibility of the prosecution's assertion that race was not a moti-

[4] As this Court observed, the state courts' failure even to "mention ... the historical record of purposeful discrimination" in evaluating petitioner's claim, and the trial court's indefensible conclusion "that there was not even the inference of discrimination to support a prima facie case," weighed heavily against the validity of their ultimate determination of a lack of purposeful discrimination. JA 42.

vating factor in the jury selection." JA 40. As with the historical evidence, the prosecution's obvious effort to eliminate African-Americans from consideration through the jury shuffle process is powerful evidence of its desire for and willingness to pursue removal of African-Americans from the jury on the basis of their race. In response, respondent recycles one argument already rejected by this Court and proposes another so far-fetched that it has never before even been mentioned in the State's five previous briefs in the Fifth Circuit and this Court.

Disputing the Court's firm conclusion that "[o]n yet another occasion the prosecutors . . . lodged a formal objection [to a defense shuffle] only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward" (JA 29), the State repeats, nearly verbatim, its briefing from *Miller-El I* that the prosecution's informal, pre-shuffle objection rules out the inference of racially discriminatory motive. *Compare* Resp. Br. 37-38 *with* Resp. Br. in *Miller-El I* 21-22. But the State's delay in registering a formal objection until after seeing that the shuffle brought African-American jurors to the front of the seating arrangement actually *supports* that inference. Moreover, the State omits to mention that the trial judge roundly criticized the substance of the prosecution's objection—making inescapable the inference that race, and not a real concern with the mechanics of the shuffle, motivated the prosecution's behavior. JA 131 (trial judge stating that "I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to do it in the manner in which it was done in this case").

The State next cites a recent Texas Court of Criminal Appeals decision in a case in which the prosecution justified its shuffle of a seating arrangement by demonstrating that the front group contained relatively few individuals wearing coats and ties, relatively many individuals with criminal histories, and at least one probation officer that the prosecutor recognized and didn't want to offend by striking. Resp. Br. 36-37 (citing *Ladd* v. *State*, 3 S.W.3d 547, 563-564 (Tex. Crim

App. 1999)). But the record in *this* case does not support any such non-race-based explanations. It demonstrates only that the front groups at issue contained a predominance of African-American jurors. *See* JA 124-129, 530. This speculative "coat-and-tie" argument—never before raised by the State—is frivolous and typifies the State's unending grasping at straws for additional post-hoc justifications for the prosecutors' conduct here. Indeed, petitioner's trial attorney twice directly accused the State of shuffling the jury to exclude African-Americans and the State twice refused to explain its behavior. JA 129, 530. As this Court explained, if evidence of a race-neutral explanation had existed, "it cannot be assumed that the State would have refrained from introducing it." JA 39-40 (internal citations and quotation marks omitted).

Even more revealing than the State's strained efforts to deny the prosecutors' plainly racial motivation in the jury shuffle process are the aspects of the jury shuffle evidence that the State *declines* to address or defend. *First* is "the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used th[e] [jury shuffle] process to manipulate the racial composition of the jury in the past." JA 40.[5] This fact "amplified"

[5] Rather than explaining the state court's omission, the State chides petitioner (Br. 39) for characterizing the testimony at issue as an "admission." The criticism is misplaced (the word is this Court's, not petitioner's) and wrong (a sitting Dallas County judge testified that, in his courtroom, Dallas County prosecutors had "volunteered the information that they requested a shuffle" to exclude African-Americans from jury service: plainly an "admission"). JA 858-859. Not even the State is prepared to argue that the testifying judge (himself a former Dallas County prosecutor) or the prosecutors in question had any reason to misrepresent the truth. Instead, the State offers the strained, one-sentence contention (Br. 39) that prosecutors' actions in one trial "ha[ve] little bearing" on the prosecutors' actions in petitioner's trial. This Court, however, obviously rejected that view, or it would not have criticized the state court for failing to mention the testimony.

this Court's concerns about the jury shuffle evidence. JA 40.[6]

Second, the State also declines to defend the Fifth Circuit's troubling one-sentence dismissal of the jury shuffle evidence: "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." JA 8. As our opening brief explained, this statement is legally irrelevant (because petitioner's actions certainly could not excuse the State's wrongdoing), factually incorrect (because prosecutors shuffled the jury *three* times), and under-inclusive (because it fails to mention the D.A.'s Office's admission and the prosecution's two frivolous and unsuccessful attempts to undo shuffles that moved, or might have moved, African-American jurors forward in the seating arrangement). *See* Pet. Br. 19-20 & nn.4, 6.

Third, apparently recognizing the futility of denying the overwhelming evidence of racial motivation in the prosecution's use of jury shuffles, the State invites this Court to "assum[e]" that the jury shuffle evidence "supports an inference of [racially] discriminatory purpose," but then asks the Court to indulge the notion that the prosecutors would *not* have that same racially discriminatory purpose in using their peremptory challenges. Resp. Br. 6.[7] Yet in its lengthy discussion of the jury shuffle evidence (*id.* at 36-40), the State fails to offer a single reason *why* the prosecutors would abandon this discriminatory objective once the jury shuffles were completed. Nor is there any reason to believe they did.

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[6] If the State means implicitly to rely on its dubious theory that "[t]he focus of the habeas court's inquiry is the state court's ultimate decision, not its process" (Br. 6), it again misses the point of this Court's specific concerns over the state court's failure to mention the testimony JA 40, 42.

[7] At another point in its brief (Br. 36), the State accuses petitioner of "overstat[ing] the significance of the State's requests for jury shuffles"—again, hardly an outright denial of discriminatory motive. The Fifth Circuit's decision offers similarly studied ambiguity. JA 8 (concluding only that petitioner's "circumstantial" jury shuffle evidence "does not overcome" the State's explanations for its peremptory strikes).

Both jury shuffles and peremptory challenges provide a perfect opportunity for those "who are of a mind to discriminate" (*Batson*, 476 U.S. at 96 (quoting *Avery* v. *Georgia*, 345 U.S. 559 (1953))), because both affect the composition of the jury and neither involves judicial oversight or action. It defies common sense (especially in light of the Dallas County prosecutors' training, history, and culture of discrimination in use of peremptory strikes) to suppose that the prosecutors in petitioner's case were perfectly willing to use the jury shuffle process to exclude African-Americans from the jury but suddenly stopped thinking that way when it came to peremptory challenges.

3. ***Disparate questioning.*** The State also declines to defend the state court's conclusion that the prosecutors in petitioner's case did not engage in disparate questioning of veniremembers (JA 929)—maintaining instead that the disparate questioning may be explained on grounds other than race. The evidence does not support that contention.

Disparate Questioning About Views on the Death Penalty. Contrary to this Court's reading of the record when this case was last before it, the State continues to deny that the prosecutors took race into account when deciding whether to preface questions about jurors' views on the death penalty with a graphic description of an execution. JA 26-27, 39. But here are the facts: the prosecutors used the graphic description for more than half of the African-American jurors (8 out of 15), but almost *none* of the white jurors (3 out of 49). JA 39.

In its earlier brief before this Court, the State tried to explain this disparity by arguing that the prosecutors reserved the graphic script for jurors whose questionnaires expressed reservations about the death penalty and that African-American jurors were more likely to have such reservations. JA 39. In making this argument, the State identified ten African-American and ten white jurors whose questionnaires expressed reservations about the death penalty or, if their questionnaires were not available, whose subsequent voir dire testimony showed that they harbored reser-

vations about the death penalty. Resp. Br. *Miller El I* 17, 18 & nn.38-39. This Court rejected the State's argument because, even if true, this meant that of the jurors with reservations about the death penalty, "7 out of 10 African-Americans and only 2 out of 10 whites were given the explicit description." JA 39.On remand, the State asserted and the Fifth Circuit accepted a new theory—first offered in Justice Thomas's dissenting opinion—which tried to explain the prosecutors' use of the graphic script by speculating still more aggressively about the possible contents of missing juror questionnaires. Our opening brief (Br. 24-26) demonstrated that inferring the contents of juror questionnaires from subsequent voir dire testimony was inconsistent with the requirements of federal habeas review. We also demonstrated (Br. 27-29), based on the record, that if the Fifth Circuit had *properly* pursued the State's speculative methodology, it would have been forced to conclude that the prosecutors gave the graphic script to any African-American juror who expressed *any* doubts or hesitation about the death penalty, but gave it only to the white jurors who expressed the *strongest possible* opposition to the death penalty. By either of the State's methodologies, therefore, nothing but racial bias explains the disparity.

Apparently conceding the accuracy of our criticism, the State now takes the position that "arguments based on questionnaires not contained in the record are 'sheer speculation.'" Resp. Br. 29 (quoting Pet. Br. 25). But in sounding this retreat, respondent omits to mention that it was the State—not petitioner—that first invited both this Court and the Fifth Circuit on remand to infer the contents of juror questionnaires from subsequent voir dire testimony. *See* Resp. Br. *Miller-El I* 17-18 & nn. 38-39; Br. of Respondent-Appellee at 26-27, *Miller-El* v. *Cockrell*, No. 00-10784 (5th Cir. 2003). Nor does the State acknowledge that this retreat fatally undercuts the Fifth Circuit's justification for concluding that the prosecution did not consider race in using the graphic script. *See* JA 16-19.

Instead, the State now propounds yet another new approach: that the Court should consider only the jurors for whom questionnaires are available (the 12 seated jurors and the 10 jurors for whom petitioner originally raised *Batson* challenges). But this new approach hardly redeems the gross racial disparity.

First, the experiences of this small subset are *ab initio* guaranteed *not* to explain why virtually no white jurors were given the graphic script. The only white jurors in the subset of veniremembers whose questionnaires are in the record are those who made it through the entire jury selection process and thus were likely to be relatively unobjectionable to either side.

Second, the State's latest approach requires it to concede (Br. 30-31) that out of 11 African-Americans for whom questionnaires are available, the seven who showed any sort of hesitation regarding the death penalty were given the graphic script. Yet, as noted in our opening brief (Br. 27) white juror Leta Girard (whose questionnaire is not available) testified during voir dire that she left blank one of the questionnaire items on the death penalty, but she did not receive the graphic script. JA 624. Four other white jurors gave questionnaire responses showing some degree of hesitation about the death penalty, yet these four *also* were not given the graphic script.[8] In other words, even in the limited sample of veniremembers whose juror questionnaire responses are known, all African-American jurors showing any hesitation received the graphic script, while several white jurors showing some hesitation did not.

Thus, the State's third attempt to concoct a race-neutral explanation for the prosecutors' conduct also fails. The fact remains that the prosecution *did* use the graphic script in a

[8] The questionnaires of three of these jurors appear in the record: JL 199 (Kevin Duke), 239 (Sandra Hearn), 176 (Marie Mazza). The fourth, Charlotte Whaley, stated in voir dire that she qualified her questionnaire answer affirming her belief in the death penalty with the phrase "[d]epending on the circumstances." JA 715.

racially discriminatory manner. Like the historical evidence of training, culture, and the conduct of these prosecutors in other cases, and the jury shuffle evidence in this case, this behavior is powerfully probative of the prosecution's general intent to exclude African-Americans from petitioner's jury. Moreover, as this Court explained, "if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." JA 39.

Disparate Questioning About Minimum Sentencing. The State also continues to deny (Br. 32-36) that its prosecutors questioned African-American veniremembers differently than white veniremembers about their willingness to impose the minimum sentence for murder.[9] Again, the facts are to the contrary: the prosecutors informed 94% (34 of 36) of white jurors but only 12.4% (1 of 8) of African-American jurors of the statutory minimum before quizzing them about what they could accept in the way of a minimum sentence for murder. JA 39.

This Court concluded that a "fair interpretation" of this evidence is "that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." JA 40. In particular, this Court noted that while petitioner's appeal was pending, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." JA 40 (*citing Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)).

The Fifth Circuit's opinion and the State's present brief are both entirely silent on Assistant District Attorney Paul Macaluso's documented use of the discriminatory minimum

[9] As this Court previously pointed out (JA 27), under Texas law at the time of petitioner's trial, unwillingness to impose the minimum sentence was cause for removal. *Huffman* v. *State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub nom. Huffman* v. *Beto*, 408 U.S. 936 (1972).

sentencing ploy.[10] As before, the most significant implication of the State's silence is the apparent concession that there is *no* good reason to expect that a prosecutor who used the minimum sentencing ploy to exclude African-Americans based on race in one case would not have used the same ploy for the same purpose in petitioner's case. The Fifth Circuit's silence on this issue after it was highlighted by this Court is especially notable.

The State devotes the bulk of its discussion of the minimum sentencing issue to the fallacious argument that the African-American jurors subjected to the minimum sentencing ploy were more opposed to the death penalty than the white jurors not subjected to that ploy. As our opening brief explained, however, this view is both unsupported in the record and specifically contradicted by a finding of this Court. *See generally* Pet. Br. 30-32. As with so much of its brief, on this issue the State simply fails to acknowledge this Court's specific conclusions drawn on precisely the same record.

4. ***Juror comparisons.*** The State also ignores this Court's observation that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." JA 37. Without attempting to reconcile either the Fifth Circuit's reasoning or its own with the precepts of this Court's *Miller-El I* decision, the State constructs its arguments with the same partial picking-over of fragmented pieces of the voir dire transcript, presented in isolation and out of context, that this Court has already rejected. *Compare, e.g.*, Resp Br. 14 *with* Resp. Br. *Miller-El I* 6-7. Indeed, the State tries to make its

[10] The State's brief does address in cursory fashion the contemporaneous judicial findings that both prosecutors in petitioner's case were found to have committed *Batson* violations in other prosecutions. Resp. Br. 41-43. But the State fails to acknowledge or discuss the fact that Macaluso was *also* found to have engaged in the minimum sentencing ploy to disqualify African-Americans from jury service, in addition to using peremptory strikes for that purpose.

case by quoting, as if it were the majority opinion, the factual conclusions of Justice Scalia's concurring opinion. Resp. Br. 18 (quoting JA 45).

A brief of this length cannot address each of the State's distortions of the voir dire record, but the fundamental error of its approach is clear. If accepted by this Court, that approach would defeat any *Batson* challenge, however meritorious.

First, according to the State, the Court must assume that prosecutors' exercises of peremptory challenges necessarily "require[] . . . [them] to assess innumerable variables and intangibles." Resp. Br. 18; *see also id.* at 1.

Second, the State picks through the voir dire of each stricken minority juror to find *any* statement or exchange that, without regard to its place in the juror's voir dire examination as a whole, might reasonably be a "variable[] and intangible[]" suggesting anything other than strong pro-prosecution feelings. *See generally* Resp. Br. 7-17. For example, the State completely ignores the fact that African-American veniremember Billy Jean Fields was a conservative, deeply religious, middle-aged family man with deep roots in the community and unflinching law-and-order and pro-death penalty views. *See* Pet. Br. 35. The State instead attempts to justify peremptorily striking him based on one snippet of voir dire—his discussion of religion and rehabilitation (Resp. Br. 11-14)—even though he added, at the very next moment, that he could impose the death penalty even on a truly rehabilitated, repentant defendant (JA 184-185).[11]

Third, when necessary to explain specific testimony in which African-American jurors whom the State struck were clearly more pro-prosecution than white jurors whom it accepted, the State reverses field. When convenient, it rejects a detailed parsing of the voir dire record in favor of characterizations of African-American prospective jurors as defendant-friendly or of white prospective jurors as prosecution-friendly on the basis of some *Gestalt* impression the prosecutors purportedly drew from the prospective juror's voir dire as a whole. Thus, although white veniremember Sandra Hearn (who was eventually seated on petitioner's jury) did not think that "anyone should be sentenced to death on [a] first offense" (JA 429), the State falls back on the claim that "throughout individual voir dire [she testified] that she believed in the death penalty" and the fact that her father was a retired FBI officer. Resp. Br. 19-20. Of course, if an African-American veniremember had been struck with just such a record—as African-American veniremember Fields was struck despite a far *stronger* pro-prosecution profile—the State would have seized on just these specific statements to justify its action.[12]

This Court should not accept the State's shifty logic. The voir dire process will always provide prosecutors (and defense attorneys) with reasons simultaneously to like and dislike all but the most extreme veniremembers (who almost certainly will be struck by one side or the other). Only those jurors who offer something for both sides to favor—and therefore for both sides to question—will be seated. Yet the State invites this Court to consider in a vacuum only whether a hypothetical, well-intentioned prosecutor might have had a single conceivable (non-racial) reason for disliking the African-American jurors who were peremptorily

[11] Fields testified that his strong religious faith actually led him *strongly to support* capital punishment: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted." JA 173-174.

[12] The State seeks to justify its failure to strike white jurors with the specious argument that particular jurors can be cavalierly written off as a generic "good prosecution juror" if defense counsel challenged or struck that white juror. *See, e.g.*, Resp. Br 18 n.9 (unnamed jurors), 20-21 (Hearn), 24 (unnamed jurors), 25 (Vickery), 26 (Davis). But a juror may well be a "bad" juror from the perspectives of both the defense and the prosecution for different reasons—as is well-illustrated by the fact that over sixty of the 108 venire members were excused in this case by agreement of the parties. JA 899.

struck and preferring the white jurors who were not. That mode of analysis would inevitably render *Batson* a dead letter and lead habeas courts to "abandonment or abdication of judicial review." JA 35.

Instead, this Court made clear in *Miller-El I* that the proper question is whether—given the history of discrimination in jury selection by this office and these prosecutors, the racially-driven jury shuffling, the race-coding of juror cards, and the racially disparate questioning—the prosecution's racially disparate use of peremptory strikes, taken cumulatively and with each decision judged in light of the full voir dire record, can be explained on grounds other than race. In particular, the Court emphasized the importance of considering whether the alleged race-neutral reasons for which the prosecutors *claim* they struck the African-American jurors appear to apply as well to white jurors they did *not* strike. If they do—as this Court believed after considering precisely the same record and arguments now before it (JA 37)—it is simply naïve and unreasonable to indulge the notion that race was not a factor.

Consider, for example, Edwin Rand and Marie Mazza. The prosecutors asserted that they struck African-American veniremember Rand because of his ambivalence about the death penalty. JA 290. But Rand expressed no greater hesitancy than did white juror Mazza (or white juror Hearn for that matter). Indeed he expressed less. Rand wrote on his juror questionnaire that he supported the death penalty "depending on [the] crime," and that he thought it was "possibly" appropriate for "all murder." JL 30. During voir dire, he confirmed that he thought the death penalty "could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation." JA 262; *see also* JA 263-264 (death penalty should be considered for robbery-murder "because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing"). Rand made one remark early in his voir dire testimony expressing some uncertainty about his ability to impose the death penalty, and

the State simply repeats that remark over and over (*see* Resp. Br. 14-15), as though it typifies Rand's testimony.[13] In fact, however, immediately after that remark and in response to point-blank questions from the prosecutor, Rand confirmed six times that he could serve on a capital jury and vote for death. JA 266-268.[14] Rand's support for the death

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[13] The Fifth Circuit noted Rand's comment that the death penalty was a "touchy subject" (JA 11), suggesting that the remark implied unwillingness to vote for a capital sentence. But the remark is better understood as simply a sensible characterization of the state of opinion about the death penalty in our country.

[14] The exchange was as follows:

Q . . . [D]o you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes, I do.

Q Okay. Now, you hesitated a few minutes ago and— . . . That's what I was coming back to, have you given it enough thought now that you feel like you're pretty certain you could do something like that?

A Yes, I do.

Q Okay, So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did it while in course of committing or attempting to commit robbery, you will find him guilty of that, if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

A Yes, I would.

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

penalty was also clear from his affirmative response to the State's query regarding the appropriate *minimum* punishment for *non-capital* murder: "I think I could still go with the death penalty on that." JA 270. The State, like the Fifth Circuit, fails to acknowledge any of these statements from Rand's voir dire testimony.[15]

By comparison with the excluded African-American Rand, who repeatedly affirmed his willingness to vote for death, retained white juror Mazza was downright equivocal in her responses about the death penalty. Like Rand, Mazza began by saying that the appropriateness of the death penalty would turn on the facts of the case. JA 353. But she then went on to share at length her uncertainties about her ability to vote for death. First, she mentioned her religious training and beliefs: "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 353-354. Then, she stressed her worry that friends and neighbors would react critically if she voted to execute someone: "Not everyone is for capital punishment and my communication with these people, I feel like right now I'm in a very respected position and I don't want to lose any respect although I feel, you know, I am a citizen and these are my decisions. I don't want it reflected on anything else. That's kind of what I have been more concerned about, what other people think." JA 355. While, in the end, she said she thought she could vote for a capital sentence, her ultimate affirmations were less direct and less numerous than Rand's.

Q You're telling me you can do that?

A Yes.

[15] Yet the prosecutors' contemporaneous notes mention some of them and indicate the prosecutors' recognition of Rand's readiness to serve: "Could be enforced depending upon circums ... Murd./Robb. — Type of offense think proper for DP ... 'Yes' — I can serve." JL 30.

An evenhanded assessment of Rand's and Mazza's testimony, then, can lead only to the conclusion that Rand's and Mazza's views on capital punishment and on voting for a death sentence were similar, and that, if one of the two was more likely to support a death sentence, it was Rand. Nothing in the opinion below or in the many briefs the State has filed in this case suggests otherwise. Thus, the conclusion seems inescapable that it was Rand's race alone that made the difference in the prosecution's decision to strike him and leave Mazza unchallenged.[16]

* * * * *

Together, the State's techniques for analyzing a record in response to a prima facie showing of racially discriminatory use of peremptories would, if countenanced, render *Batson* entirely impotent. If the general impression favors the African-American juror, a detail can be found upon which to object; if the details favor the African-American juror, it is the *Gestalt*, determined by the State, that matters. The only limit on this strategy is the creativity of the State's appellate lawyers. It is unnecessary to look further than petitioner's case to see that this is so: the respondent's brief seeks to obscure a glaringly obvious mosaic of racial discrimination by dwelling myopically on tile-by-tile argumentation. This Court should ensure, by reversing the Fifth Circuit and granting Miller-El's petition for a writ of habeas

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[16] One aspect of Rand's testimony also illustrates another way in which the State uses double standards when assessing the voir dire testimony of African-American and white veniremembers. When discussing white juror Sandra Hearn, the State discounts one basis of her hesitation about the death penalty, namely, her opposition to the death penalty for first offenders, by suggesting that it was unimportant in light of the fact that this was not petitioner's first offense. *See* Resp. Br. 19. But African-American Rand receives no similar dispensation from the State even though he made clear that, whatever factual circumstances in a murder case might lead him to conclude that it did not warrant the death penalty, he supported death for robbery-murders fitting the facts of this case. *See* JA 262-264.

corpus, that the clear pattern in the mosaic as a whole decides this and other cases.[17]

CONCLUSION

For the foregoing reasons, in addition to those set forth in our principal brief, the Court should reverse the judgment of the court of appeals and grant the petition for a writ of habeas corpus.

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[17] The State of California's *amicus* brief correctly observes that respondent has waived any right to object—if indeed such grounds for objection exist—to petitioner's use of comparative juror analysis to establish a *Batson* claim. Calif. Br. 5-6 (citing JA 910); *see also id.* at 8. Thus, the Court's view on the question California raises can have no bearing on the resolution of the merits of *this* case. *See, e.g., United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 61 n.2 (1981) (holding that amici cannot raise an issue waived by the parties).

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No. 03-9659

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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS JOE MILLER-EL, *Petitioner,*

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
IN DECIDING THIS CASE, THE COURT SHOULD NOT SUGGEST (EVEN IMPLICITLY) THAT A DEFENDANT MAY PRESENT A COMPARATIVE ANALYSIS OF THE VENIRE MEMBERS FOR THE FIRST TIME ON DIRECT APPEAL OR COLLATERAL REVIEW	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky 476 U.S. 79 (1986)	1, 3
Burks v. Borg 27 F.3d 1424 (9th Cir. 1994)	8
Collins v. Rice 365 F.3d 667 (9th Cir. 2004) *petition for cert. filed* (U.S. July 7, 2004) (No. 04-52)	7, 8
Ford v. State 1 S.W.2d 691(Tex. Crim. App. 1999)	6
Gibson v. State 117 S.W.3d 567 (Tex.App.—Corpus Christi 2003) *rev. granted*, (Tex. Crim. App. April 7, 2004)	6
Hernandez v. New York 500 U.S. 352 (1991)	3, 4
Lewis v. Lewis 321 F.3d 824 (9th Cir. 2003)	7
McClain v. Prunty 217 F.3d 1209 (9th Cir. 2000)	7
Miller-El v. Cockrell 537 U.S. 332 (2003)	2, 4-6

TABLE OF AUTHORITIES (continued)

	Page
People v. Box 23 Cal.4th 1153 5 P.3d 130 (2003)	7
People v. Johnson 30 Cal.4th 1302 71 P.3d 270 (2003)	4, 5, 7
People v. Johnson 47 Cal.3d 1194 767 P.2d 1047 (1989)	4
Powers v. Ohio 499 U.S. 400 (1991)	3
Purkett v. Elem 514 U.S. 765 (1995)	3
State v. Martin 68 N.W.2d 399 (S.D. 2004)	5
Turner v. Marshall 121 F.3d 1248 (9th Cir. 1997)	7
Turner v. State 861 S.W.2d 36 (Tex. App.- Houston 1993)	6
U.S. v. Alanis 335 F.3d 965 (9th Cir. 2003)	7, 8
Young v. State 826 S.W.2d 141 (Tx. Crim. App. 1991)	6

TABLE OF AUTHORITIES (continued)

	Page
Statute	
28 U.S.C. § 2254(d)	7
Other Authorities	
Antiterrorism and Effective Death Penalty Act of 1996	7

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-9659

THOMAS JOE MILLER-EL, *Petitioner,*

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *Respondent.*

INTEREST OF AMICUS CURIAE

This case raises the question of whether Texas prosecutors committed error under *Batson v. Kentucky*, 476 U.S. 79 (1986), in peremptorily challenging jurors in a capital case. One of the arguments asserted by petitioner in support of his *Batson* claim is that a comparison between the prospective jurors who were peremptorily challenged and those who were retained reveals that the prosecution's challenges were racially based. The parties have not addressed, however, whether an appellate or habeas court may conduct a comparative analysis of challenged and retained jurors if petitioner did not present a comparative analysis to the trial court in support of his *Batson* motion. In California, a reviewing court is precluded from engaging in a comparative analysis if the argument was not raised in the trial court. The interest of California in this case is to preserve its rule and avoid this Court implicitly sanctioning the notion that a defendant may present a comparative analysis for the first time

on appeal or collateral review when no such analysis had been presented to, or evaluated by, the trial court.

SUMMARY OF ARGUMENT

Although *Batson* set forth a framework for evaluating an objection to a discriminatory peremptory challenge, the Court did not specify how to implement the framework it established, instead leaving that task to trial courts. A comparative analysis of the prospective jurors is one means by which a defendant can demonstrate that a party exercised an unconstitutional peremptory challenge. In California, a party must present a comparative analysis to the trial court before such an analysis may be considered on review. This rule ensures that the tribunal most familiar with the facts and best able to evaluate the parties' credibility is able to consider the argument. A reviewing court cannot effectively compare prospective jurors or evaluate the prosecutor's credibility on a cold record.

Whether Texas has such a requirement is unclear, and evidently respondent has never argued that a defendant must assert a comparative analysis argument in the trial court before it may do so again in appellate and habeas courts. Nevertheless, relying in part on this Court's prior decision in *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003), the Ninth Circuit has held that there is no such requirement and has several times engaged in a comparative analysis for the first time on federal habeas review. As a consequence, the Ninth Circuit has found state court *Batson* rulings to be unreasonable based in part on comparative analyses that California appellate courts are barred (quite properly) from undertaking. California seeks to apprise the Court of this situation so that the Court does not inadvertently support the Ninth Circuit practice of allowing a comparative analysis argument to be raised for the first time on federal habeas corpus.

ARGUMENT

IN DECIDING THIS CASE, THE COURT SHOULD NOT SUGGEST (EVEN IMPLICITLY) THAT A DEFENDANT MAY PRESENT A COMPARATIVE ANALYSIS OF THE VENIRE MEMBERS FOR THE FIRST TIME ON DIRECT APPEAL OR COLLATERAL REVIEW

In *Batson*, this Court established a framework involving a three-step procedure for evaluating an objection to an unconstitutional peremptory challenge:

> Under [this Court's] jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam); *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion); *Batson*, 476 U.S. at 96-98. Beyond the three-pronged approach established in *Batson*, however, the Court has not mandated what particular procedures must be used to implement the decision. Rather, the Court has charged trial courts with developing such rules. *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *see also Batson*, 476 U.S. at 99 & n.24.

One tool that some courts have used to evaluate a prosecutor's nondiscriminatory justifications (*Batson* step three) is comparative analysis. This process entails comparing the dismissed jurors (*i.e.*, those alleged to have been peremptorily challenged for an assertedly racially-based reason) with retained jurors who have similar attributes or characterizations to the excused jurors. The information is then factored into the trial

judge's evaluation of whether the peremptory challenges amounted to purposeful discrimination. *See People v. Johnson*, 30 Cal.4th 1302, 1318-1320, 71 P.3d 270 (2003).

In order for comparative analysis to be a fair and effective tool for implementing *Batson*, the defendant must present a comparative analysis argument to the trial court when that court is addressing the defendant's *Batson* motion. An appellate (or habeas) court addressing a comparative analysis argument made for the first time on appeal (or on habeas review) would face several obstacles. The cold record may not even reveal the race of the jurors challenged or retained, let alone body language or demeanor. A reviewing court is simply unable to evaluate important extra-record evidence necessary to determine whether the jurors are truly comparable. In addition, absent the objection being made at trial, the reviewing court would not have the benefit of a contemporaneous response from the prosecutor who exercised the challenge. Without that explanation, the reviewing court's "comparative juror analysis could not accurately take into account the various factors that influence the decision to make a peremptory challenge." *Johnson*, 30 Cal.4th at 1324, n.7 *(citing People v. Johnson*, 47 Cal.3d 1194, 1220-1221, 767 P.2d 1047 (1989)). *See also Miller-El*, 537 U.S. at 339 (quoting *Hernandez*, 500 U.S. at 365) ("There will seldom be much evidence bearing on [whether counsel's race-neutral explanation should be believed], and the best evidence often will be the demeanor of the attorney who exercises the challenge.").

Finally, this Court has emphasized that a trial court's finding that counsel had no discriminatory intent is a "'pure issue of fact'" and therefore is "'accorded significant deference.'" *Miller El*, 537 U.S. at 339 (*quoting Hernandez*, 500 U.S. at 365). In establishing this highly deferential standard of review, the Court has noted concerns such as evidence that does not appear in the record. *Miller-El*, 537 U.S. at 339. Likewise the California Supreme Court has emphasized that "permitting appellate courts to overturn trial court decisions

based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts." *Johnson*, 30 Cal.4th at 1324; *see also State v. Martin*, 68 N.W.2d 399, 405 (S.D. 2004) (generally noting the difficulties associated with conducting comparative analysis on a cold record).

This case does not present the question whether a comparative analysis asserted for the first time before a reviewing court is a proper tool for deciding step three *Batson* issues. To be sure, when this case was last before it, this Court spent considerable time discussing comparative analysis. *Miller-El*, 537 U.S. at 329, 331-335, 343. Indeed, the Court red-flagged the possibility that it would rely upon comparative analysis to decide *Batson* issues in the future: "Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination *at this stage*, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred." *Id.* at 343 (emphasis added). But that opinion did not address whether all (or any of) the bases of the comparative analysis it discussed were raised in the trial court. There was a good and obvious reason for this. Respondent did not argue to this Court that petitioner waived his comparative analysis argument by failing to assert it in the trial court.

Respondent presumably eschewed that argument because he had previously waived it. The federal magistrate judge, after

noting that petitioner did not "present[ ] to the state court" his comparative analysis (JA 910)[1], explained that:

> The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. *See* Order, 7/28/99. Respondent conceded that these arguments "are subsumed within the broad *Batson* issue and are not tantamount to the presentation of a new claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

JA 910, n.12. Respondent may have made that concession due to the uncertainty in Texas law as to whether a comparative analysis argument may be raised for the first time on appeal. *Compare Young v. State*, 826 S.W.2d 141, 142-46 (Tx. Crim. App. 1991) (holding, in a non-capital case, that a comparative analysis argument *may* be raised for the first time on appeal), *with Turner v. State*, 861 S.W.2d 36, 38-39 (Tex. App.—Houston 1993) (distinguishing *Young* and holding that a comparative analysis argument may *not* be raised for the first time on appeal in a capital case).[2] Alternatively, respondent may have concluded that the state trial court *sua sponte* conducted a comparative juror analysis in the course of holding that the prosecutors did not engage in disparate treatment. *See* JA 878.

The California Supreme Court permits defendants to assert comparative analysis arguments in support of *Batson* motions.

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1. The Joint Appendix for this case will not be available to counsel for Amicus State of California prior to the filing deadline for this Amicus Brief. Therefore, the citations to "JA" refer to the previous Joint Appendix filed with the briefing in *Miller-El*, 537 U.S. 322.

2. Texas law on this issue remains unclear. In *Gibson v. State*, 117 S.W.3d 567, 578-579 (Tex.App.—Corpus Christi 2003), *rev. granted*, (Tex. Crim. App. April 7, 2004), the court stated that the Texas Court of Criminal Appeals had *sub silentio* overruled *Young* in *Ford v. State*, 1 S.W.2d 691, 693 (Tex. Crim. App. 1999).

Significantly, however, it steadfastly refuses to engage in such analysis for the first time on appeal. *Johnson*, 30 Cal.4th at 1325 ("[A] reviewing court should not attempt its own comparative juror analysis for the first time on appeal. . . . While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate."); *People v. Box*, 23 Cal.4th 1153, 1190, 5 P.3d 130 (2003). In contrast, the Ninth Circuit does not require that a comparative analysis argument be preserved in the trial court. In fact, the Ninth Circuit will engage in comparative analysis, not only for the first time on appeal, but also for the first time on federal habeas review. *See, e.g., Collins v. Rice*, 365 F.3d 667, 681-682 (9th Cir. 2004), *petition for cert. filed*, (U.S. July 7, 2004) (No. 04-52); *U.S. v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003); *Lewis v. Lewis*, 321 F.3d 824, 832-833 (9th Cir. 2003); *McClain v. Prunty*, 217 F.3d 1209, 1220-1224 (9th Cir. 2000); and *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997). This creates an obvious problem in federal habeas corpus cases in which the petitioner asserts a *Batson* violation but failed to present a comparative juror analysis to the state trial court. The Ninth Circuit has been finding the credibility determinations of California courts unreasonable, and not entitled to deference under 28 U.S.C. § 2254(d), based on its own comparative analysis. *See, e.g., Collins*, 65 F.3d at 681-682; *Lewis*, 321 F.3d at 832-833; *McClain*, 217 F.3d at 1220-1224.[3] In such cases, the Ninth Circuit is faulting the state appellate courts for having reached unreasonable decisions based on an analysis that the state appellate courts were barred — for perfectly sensible reasons — from undertaking. The differing approaches of the California appellate courts and the Ninth Circuit as to whether

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3. The Ninth Circuit appears to treat the role of comparative analysis that was never raised in the trial court the same whether the case is pre- or post-AEDPA, or whether the case originated in a state or federal court. *Compare, e.g., Turner*, 121 F.3d 1248, *with Alanis*, 335 F.3d at 969.

comparative juror analysis must first be raised in the trial court distorts application of the § 2254(d) deference standard. The California Supreme Court and Ninth Circuit have recognized their different practices. *Johnson*, 30 Cal.4th at 1323-1324; *Burks v. Borg*, 27 F.3d 1424,1427 (9th Cir. 1994) (noting that the United States Supreme Court "has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right").

There are several ways in which the Court's resolution of the instant case may impact the California Supreme Court's rule. This Court's former decision in *Miller-El* did not decide whether comparative analysis must be raised in the trial court before it is considered on review. But in two cases, *Collins*, 365 F.3d at 681-682 and *Alanis*, 335 F.3d at 969, the Ninth Circuit engaged in comparative analysis for the first time on collateral review and cited *Miller-El* when it did so. Apparently, the Ninth Circuit viewed *Miller-El's* discussion of comparative juror analysis -- without a prefatory discussion of whether that analysis was raised in the trial court -- as permitting federal courts to engage in a comparative juror analysis for the first time on collateral review. There is every reason to believe that the Ninth Circuit will look to the Court's opinion in this case for further guidance on this issue even though, once again, the issue is not presented to the Court.

For this reason, it would be very helpful for this Court to make explicit that it is *not* addressing the issue of whether comparative analysis arguments must be raised in the trial court in order for appellate or habeas courts to engage in comparative analyses. Amicus State of California respectfully submits that, if the Court conducts a comparative analysis in deciding petitioner's *Batson* claim, it also note that respondent has waived any argument that the Court should not engage in a comparative analysis because the argument was not preserved in the trial court.

CONCLUSION

California seeks to maintain its rule that comparative analysis may not be raised for the first time on direct appeal and, concomitantly, to receive the benefit of its rule when California cases are collaterally reviewed on federal habeas corpus. In deciding this case, the Court should ensure it does not implicitly support the notion that comparative analysis may be raised for the first time on direct or collateral review - an issue that is not before the Court.

Dated: September 1, 2004

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IN THE

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THOMAS JOE MILLER-EL,

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v.

DOUGLAS DRETKE,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. § 2254(d)(2) and (e)(1).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES UNDERMINES THE INTEGRITY OF THE JUDICIAL SYSTEM	5
II. THE FIFTH CIRCUIT DISREGARDED THE CLEAR PRECEDENT AND DIRECTIVES OF *BATSON* AND *MILLER-EL I*	9
A. The Fifth Circuit Eliminated The Third Step In The Three-Step Test Established By *Batson* And Reaffirmed By *Miller-El I* By Refusing Altogether To Review The Trial Court's Finding Of Credibility With Respect To The Prosecutors' Proffered Race-Neutral Justifications	10
B. On Remand, The Fifth Circuit Improperly Evaluated Petitioner's Claim	14
1. The Fifth Circuit Contravened this Court's Decision in *Miller-El I* by Refusing to Consider the Totality of Petitioner's Evidence	15

TABLE OF CONTENTS—continued

Page

2. The Fifth Circuit's Divide-and-Conquer Approach Did Not Properly Evaluate Whether Petitioner Presented Clear and Convincing Evidence that the Trial Court Erred 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page

Batson v. *Kentucky*, 476 U.S. 79 (1986) ..... *passim*
Baumgartner v. *United States*, 322 U.S. 665 (1944) 19
Caldwell v. *Maloney*, 159 F.3d 639 (1st Cir. 1998) 21
Collins v. *Rice*, 365 F.3d 667 (9th Cir. 2004), *petition for cert. filed*, No. 04-52 (U.S. July 7, 2004) 15
Colorado v. *New Mexico*, 467 U.S. 310 (1984) 19
Coulter v. *Gilmore*, 155 F.3d 912 (7th Cir. 1998) .. 15
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 5
Georgia v. *McCullom*, 505 U.S. 42 (1992) 6
Harris v. *Forklift Sys., Inc.*, 510 U.S. 17 (1993) 21
Hernandez v. *New York*, 500 U.S. 352 (1991) 14, 16, 21, 22
Hutto v. *Davis*, 454 U.S. 370 (1982) 13
Jordan v. *Lefevre*, 206 F.3d 196 (2d Cir. 2000) 15
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) ..... *passim*
Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 13
Norris v. *Alabama*, 294 U.S. 587 (1935) 22
Powers v. *Ohio*, 499 U.S. 400 (1991) 1, 2, 5
Purkett v. *Elem*, 514 U.S. 765 (1995) 12, 16
Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 16
Riley v. *Taylor*, 277 F.3d 261 (3d Cir. 2001) 15, 20
Strauder v. *West Virginia*, 100 U.S. 303 (1879), *abrogated on other grounds by Taylor* v. *Louisiana*, 419 U.S. 522 (1975) 5
Strickler v. *Greene*, 527 U.S. 263 (1999) 1, 15
Swain v. *Alabama*, 380 U.S. 202 (1965), *overruled by Batson* v. *Kentucky*, 476 U.S. 79 (1986) 16

TABLE OF AUTHORITIES—continued

	Page
Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981)	16
United States v. *Alvarado*, 923 F.2d 253 (2d Cir. 1991)	18, 21
United States v. *Arvizu*, 534 U.S. 266 (2002)	21
United States v. *Hill*, 146 F.3d 337 (6th Cir. 1998)	15
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	13
Williams v. *Taylor*, 529 U.S. 362 (2000)	18

STATUTE

28 U.S.C. § 2254	3, 19

SCHOLARLY AUTHORITIES

Symposium, *Minnesota Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477 (1993)	6
Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 Litig. 14 (2004)	8
David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001)	6
Kristy Bowling, *Miller-El v. Cockrell: Procedural Rules to Protect Prisoners' Rights*, 35 U. Tol. L. Rev. 723 (2004)	9
George W. Dougherty et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny*, 37 Ga. L. Rev. 1021 (2003)	5, 7

TABLE OF AUTHORITIES—continued

	Page
Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition, Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003)	7, 8
Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285 (1999)	7
Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877 (1999)	7

OTHER AUTHORITIES

Kevin Collison, *WNY Study Urges Increase in Ranks of Minority Jurors*, Buffalo News, Apr. 19, 2000, *available at* 2000 WL 5675310	6
National Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf	7
Pennsylvania Supreme Court Comm. on Racial & Gender Bias in the Justice Sys., *Final Report* (2003), *available at* http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf	6

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former judges and prosecutors, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. Plausible allegations of race discrimination in the courthouse itself severely discredit the administration of justice and diminish its authority. They must be scrupulously reviewed in order to preserve public confidence in the criminal justice system, to safeguard the democratic right of all citizens to be fairly considered for jury service, and to assure just and reliable outcomes for individuals facing loss of life or liberty through the criminal process.

Judges serve as the ultimate guardians of the judicial process. In that capacity, they "are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

For their part, prosecutors exercise their duties as officers of the court to enforce the criminal laws. This Court has repeatedly underscored "the special role" of the prosecutor to ensure that justice is done even at the expense of the legitimate prosecutorial interest in securing convictions. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutorial function suffers when the criminal justice system

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

operates in a discriminatory manner, including all of those instances when counsel for any party uses peremptory challenges to exclude citizens from jury service based upon their race.

The question presented is critically important to the integrity of the trial process and to the effective administration of justice in a multi-racial society. Members of the bench and law enforcement officials also bear responsibility for maintaining a justice system that honors the equal treatment of all persons and instills trust in the citizenry it serves, conditions that are necessary to the effective administration of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

For 125 years "this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded." *Powers*, 499 U.S. at 404. The opinion of the Court of Appeals for the Fifth Circuit on remand directly conflicts with that precedent and threatens the public's confidence in the role of the jury and the rule of law.

The Court first considered this case on review of the Fifth Circuit's denial of petitioner's request for a Certificate of Appeal ("COA"). *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), J.A. 19-57. The Court ruled that the Fifth Circuit made two errors in applying the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") by (i) improperly deciding the merits of petitioner's appeal at the COA stage, and (ii) imposing an inappropriately high burden of proof. Accordingly, the Court reversed the denial of the COA and remanded the case to the Fifth Circuit for review

[2] *Amici* adopt the facts and procedural history set forth in petitioner's Brief on the Merits.

under the correct standard. *Miller-El I*, J.A. 32-38. Characterizing the Fifth Circuit's consideration of petitioner's evidence as "dismissive and strained" (*id.* at 34), this Court signaled its ongoing commitment to *Batson* through a detailed, although preliminary, consideration of petitioner's "extensive evidence concerning the jury selection procedures" (*id.* at 23) and an admonition that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review" or preclude relief. *Id.* at 31. The Court's opinion in *Miller-El I* therefore provided substantial guidance to the court below as to how it should approach its task on remand in determining whether petitioner had proved by "clear and convincing" evidence that the trial court erred in finding that no purposeful discrimination occurred during the selection of petitioner's jury. *Id.* at 31-32.

On remand, however, the Fifth Circuit rejected this Court's directives concerning how trial courts should evaluate evidence in the third step of a *Batson* inquiry and how appellate courts should review *Batson* claims under 28 U.S.C. § 2254(d)(2) & (e)(1). Instead, the Fifth Circuit adopted a framework that altered the three-step test announced in *Batson* and reaffirmed in *Miller-El I*. Even within its own analytical framework, the Fifth Circuit strained to deny petitioner relief by ignoring this Court's command to consider all of the circumstances surrounding the peremptory challenges and their legal import. For example, the Fifth Circuit ignored some of the most salient facts: stark racial disparity in the prosecution's use of its peremptory challenges and in its questioning of prospective jurors. This Court, however, had highlighted those items of evidence as the source of some of its deepest concerns. As to the evidence it did address, the Fifth Circuit omitted crucial portions of that evidence (*e.g.*, that the prosecution's jury shuffling was done when the front of the panel contained a significant number of African-Americans), and failed to consider whether the

totality of petitioner's circumstances was "clear and convincing" evidence that the trial court erred in declaring that no purposeful discrimination had occurred. The result on remand is not a failure of evidence, but rather a failure of analysis.

As officers of the court, *amici* are aware that too many citizens, particularly African-Americans, believe they do not receive equal treatment under the law when trials are decided by juries that are not representative of the community. *Amici* are likewise concerned that this belief undermines the public's confidence in the integrity of the criminal justice system. The public, the judiciary and the law enforcement community saw this Court's ruling in *Miller-El I* as a highly visible reaffirmation of the Constitutional principles set forth in *Batson*. The public, the judiciary and the law enforcement community are watching still.

Amici believe that anything less than a reversal of the Fifth Circuit's decision would send a highly visible, detrimental signal that this Court has retreated from its clear rulings in *Batson* and *Miller-El I*. The opinion on remand strikes at the very heart of the integrity of the criminal justice system. It undermines public confidence in the role of the jury and in the principle that redress of constitutional violations can be achieved through the process of judicial review. The Fifth Circuit's refusal to heed this Court's instructions on remand to consider *all* of petitioner's evidence in reaching the ultimate determination under the three-step test required by *Batson* and *Miller-El I* requires this Court to reverse the court of appeals' holding below and grant petitioner's requested relief.

ARGUMENT

I. RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES UNDERMINES THE INTEGRITY OF THE JUDICIAL SYSTEM.

When the Court first condemned the intentional exclusion of African-Americans from juries, it observed that jury service is a fundamental aspect of citizenship because it permits ordinary citizens to "participate in the administration of the law." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975). The opportunity to participate in the administration of justice through jury service significantly increases the public's trust in the fairness of the justice system as well as the results that the system produces.[3] "Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407; *see also Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) (jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering . . . a respect for law").

By compromising the representative quality of the jury, race-based peremptory challenges "undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *see also Powers*, 499 U.S. at 411 ("racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' and places fairness of a criminal proceeding in doubt") (citation omitted) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). The diminished public confidence that results from discriminatory jury selection is of great concern to members of the judiciary

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[3] George W. Dougherty et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny*, 37 Ga. L. Rev. 1021, 1030-31 (2003) ("*Georgia Public Trust and Confidence Survey*").

and to law enforcement because of the wide ripple effects that a lack of public faith can cause. Prosecutors and judges depend upon the willingness of juries to convict when the evidence warrants, and that willingness is undermined when jurors lose faith in the fairness of the system. Accordingly, *Batson*'s rules apply to defense counsel as well, for wherever race is an issue—or even *perceived* to be an issue—it is essential that all ethnic groups in our diverse nation are satisfied that verdicts are the result of a fair jury selection process. *See Georgia v. McCullom*, 505 U.S. 42, 49, 54 (1992). Further, the Court must ensure that trial courts are "sensitive to the racially discriminatory use of peremptory challenges" in order to "enforce[] the mandate of equal protection and further[] the ends of justice." *Batson*, 476 U.S. at 99. These important judicial and law enforcement interests in the integrity of the jury system and in the public's acceptance of jury verdicts will be harmed without rigorous, steadfast enforcement of the Court's *Batson* jurisprudence.

Nearly 20 years after *Batson* was decided and petitioner was tried and sentenced to death, race discrimination still has not been eradicated from the jury selection process. The persistent unconstitutional use of peremptory challenges has been demonstrated by empirical studies.[4] The effect of this discrimination on the public's confidence in jury verdicts, and thus in the judicial process, is pronounced and deeply troubling to *amici*. In significant numbers, persons of color, particularly African-Americans, believe that they are not

[4] *See, e.g.*, Kevin Collison, *WNY Study Urges Increase in Ranks of Minority Jurors*, Buffalo News, Apr. 19, 2000, at A1, *available at* 2000 WL 5675310; Pennsylvania Supreme Court Comm. on Racial & Gender Bias in the Justice Sys., *Final Report* 50-102 (2003), *available at* http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (racial and ethnic bias in jury selection, including a summary of findings in other states); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001); Symposium, *Minnesota Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477 (1993).

afforded equality before the law and view juries as unrepresentative.[5] A 1999 survey undertaken by the National Center for State Courts to examine public attitudes toward the judicial system revealed that African-Americans and Hispanics were more likely than whites to agree that "[m]ost juries are *not* representative of the community."[6] The Georgia Public Trust and Confidence Survey, conducted at the request of the Georgia Supreme Court, also asked respondents whether most juries are *not* representative of the community. The Georgia study found that, whether or not they had served as jurors, a majority of whites agreed with the statement (57.3 percent compared to 53.5 percent). However, 66 percent of African-Americans who had no prior jury service agreed that juries are not representative of the community, compared to 46.7 percent of those who had sat as jurors.[7]

Amici believe that *Batson* offers the most effective, long-term safeguard against jury nullification as well as a vital means of ensuring public confidence in the verdict when there is a conviction.[8] Jury verdicts are most likely to be accepted by the public when they are the product of a diverse jury that is fairly selected.[9] A survey of jury-eligible individuals found that when the jury was diverse, the verdict—conviction or

[5] National Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* 29-32, 37-38 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

[6] *Id.* at 7, 29 (emphasis added).

[7] *Georgia Public Trust and Confidence Survey*, *supra*, at 1033.

[8] *See, e.g.*, Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285, 316 (1999); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 937 (1999).

[9] *See, e.g.*, Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003).

acquittal—did not influence perceptions of the trial's fairness.[10] However, when the jury did not include minority members, observers viewed the trial as less fair if it produced a guilty verdict.[11] National conviction rates in felony cases are close to 90 percent.[12] "If the racial composition of a jury is more likely to affect perceptions of the fairness of the trial procedure when the trial results in a conviction, jury composition will be an important factor [in reinforcing perceptions of fairness] in a majority of criminal trials."[13]

Taken together, these results affirm that jury service tends to increase public confidence in the courts. The statistically significant differences in the views of those African-Americans who have served as jurors and those who have not provides evidence to support the Court's concern in *Batson* that excluding African-Americans from juries undermines perceptions of fairness in our system of justice.[14] *See Batson*, 476 U.S. at 87. This perception of fairness, in turn, is critical to ensuring both that jurors perform their sworn duties with dispassionate fairness, based only on the law and the facts, and that their judgments are accepted by the public. These elements are necessary for judges and prosecutors to effectively administer the criminal justice system in a multi-racial society.

The Court's opinion in *Miller-El I* sounded an important re-affirmation of *Batson's* mandate to eradicate racial discrimination in the jury selection process. *See, e.g.*, Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 Litig. 14, 15 (2004) (In *Miller-El I*, "the Court

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[10] *Id.* at 1049.

[11] *Id.*

[12] *Id.* at 1049-50 & n.43 (citing Carol J. DeFrances & Greg W. Steadman, Bureau of Justice Statistics Bull., *Prosecutors in State Courts, 1996*, at 5 (1998)).

[13] *Id.* at 1050.

[14] *Id.* at 1044-45.

reinforced *Batson*'s promise of equal protection in the selection of citizens to judge matters of profound interest to both the parties and the community."); Kristy Bowling, *Miller-El v. Cockrell: Procedural Rules to Protect Prisoners' Rights*, 35 U. Tol. L. Rev. 723, 724 (2004) ("In *Miller-El* the Court reaffirmed the evidentiary framework and has strengthened the *Batson* Doctrine. In doing so, it not only helped guarantee a defendant's constitutional liberties but also worked toward ensuring all races are treated equally in our criminal justice system."). Failure to enforce this mandate will severely undermine public confidence in the integrity of the jury and the fairness of the justice system. No participants in the justice system, including judges and prosecutors, are served by that outcome.

II. THE FIFTH CIRCUIT DISREGARDED THE CLEAR PRECEDENT AND DIRECTIVES OF *BATSON* AND *MILLER-EL I*.

In *Miller-El I*, the Court held that the Fifth Circuit had applied an overly demanding standard, inconsistent with the AEDPA, to deny petitioner's request for a COA. J.A. 32. In a detailed, "threshold examination" of the record, this Court identified the evidence of racial discrimination in the selection of petitioner's capital jury that supported petitioner's *Batson* claim: disparate questioning of African-American jurors; striking African-American jurors for reasons that applied equally to white jurors; "shuffling" the jury panel when prosecutors "had no information about the prospective jurors other than their race" (*id.* at 25-26) to minimize the likelihood that African-American jurors would serve on the jury; and the continuing effect of discriminatory practices that had been institutionalized into the culture of the Dallas County District Attorney's office. *Id.* at 23-27, 33-37. The Court reversed the denial of the COA and remanded the case to the Fifth Circuit to review petitioner's claim on appeal "consistent with this opinion." *Id.* at 38.

On remand, the Fifth Circuit contravened this Court's decision and analysis of petitioner's evidence in *Miller-El I* in two important ways. First, the Fifth Circuit eliminated the crucial third step in the three-step test created in *Batson*, which requires reviewing courts to make a deferential, but nonetheless independent and critical assessment of whether the proffered reason for the peremptory strikes masked discriminatory intent. The Fifth Circuit's truncated two-step analysis contravenes *Batson* and, if followed by other courts, will essentially preclude any findings of purposeful discrimination in jury selection.

Second, contrary to the unambiguous instruction of this Court in *Miller-El I*, the Fifth Circuit failed to assess all of the circumstances surrounding the jury selection process in determining petitioner's claim. With regard to the evidence it did consider, the Fifth Circuit improperly applied the "clear and convincing" standard of proof against each *individual* evidentiary claim, rather than weighing the *totality* of the circumstances. Thus, on remand the Fifth Circuit strained to avoid the conclusion that flows ineluctably from a review of the evidence according to the framework prescribed by the Court in *Batson* and *Miller-El I*: petitioner has presented clear and convincing evidence that the trial court's factual determination that no purposeful discrimination occurred was incorrect.

A. The Fifth Circuit Eliminated The Third Step In The Three-Step Test Established By *Batson* And Reaffirmed By *Miller-El I* By Refusing Altogether To Review The Trial Court's Finding Of Credibility With Respect To The Prosecutors' Proffered Race-Neutral Justifications.

In *Miller-El I*, the Court directed the Fifth Circuit to undertake a review of petitioner's *Batson* claim under the provisions of 28 U.S.C. § 2254(d)(2) & (e)(1). J.A. 37-38. The only issue on remand was the third step of the *Batson* inquiry, where the "critical question" is the "persuasiveness

of the prosecutor's justification for his peremptory strike." *Id.* at 30. The Court furnished a blueprint for deciding the merits of petitioner's claim, "explain[ing] in some detail the extensive evidence concerning the jury selection procedures [during petitioner's trial]," which consisted both of facts "relating to a pattern and practice of race discrimination in the *voir dire*" and evidence "directly related to the conduct of the prosecutors in his case." *Id.* at 23. Addressing the proper standard for review under § 2254(d)(2) & (e)(1), the Court cautioned that "deference does not imply abandonment or abdication of judicial review." *Id.* at 31. It underscored that the statutory constraints of the AEDPA "do[] not by definition preclude relief," and that "[a] federal court can disagree with a state court's credibility determination" under either or both subsections of § 2254. *Id.*

The Fifth Circuit's opinion on remand undid entirely the Court's decision and analysis in *Miller-El I*. In evaluating whether purposeful discrimination occurred, the Fifth Circuit declared that "it is important to identify the prosecution's stated reasons for exercising a peremptory challenge. *Once we have identified the reasons for the strikes, the credibility of the reasons is self-evident.*" J.A. 8. (emphasis added).

The Fifth Circuit's alteration of the *Batson* test is remarkable on two fronts. First, the Court remanded this case for the Fifth Circuit to consider, and consider with some care in light of petitioner's weighty evidence, the question that lies at the very heart of *Batson*: whether petitioner met his burden of proving purposeful discrimination (in the context of federal habeas review). By declaring the prosecutors' race-neutral justifications "self-evident[ly]" credible, however, the Fifth Circuit eliminated the need to consider any evidence to evaluate the credibility of these justifications—the very analysis required by the third step of *Batson*. The Fifth Circuit has created a tautological framework for review of *Batson* challenges, which simply begs the very question that this Court expressly declared it should consider.

The Fifth Circuit's tautological framework further led it to ignore the factors identified by this Court as relevant to measuring the credibility of the prosecutors' justification for the peremptory strikes. As this Court instructed, credibility "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." J.A. 30. The Fifth Circuit said nothing about the factors identified by this Court, and did not articulate or use any other factor for measuring the credibility of the prosecutors' explanations. It only said that the reasons were "self-evident[ly]" credible (*id.* at 8), which is to *decide* the credibility question rather than, as *Batson* requires, engaging in further analysis to determine whether the prosecution's explanations were in fact credible in light of the totality of petitioner's evidence. *See id.* at 40. Under its altered *Batson* test, the Fifth Circuit has eliminated its "duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98.

Second, and of greater significance beyond this case, the Fifth Circuit has created a new rule that converts *Batson*'s three steps into two. Following the Fifth Circuit's model, other appellate courts will accept race-neutral explanations as *self-evidently* credible, without considering the credibility of the explanations in their full context or determining, consistent with the demands of the Equal Protection Clause, whether the proponent has met his ultimate burden of persuasion. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam); *see also Batson*, 476 U.S. at 98 ("[i]f these general assertions [denying discriminatory motives] were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement'") (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)). Unless a lawyer fails to proffer *any* facially neutral reason at step two, every peremptory challenge exercised because of the juror's race will survive appellate review of a *Batson*

challenge under the Fifth Circuit's new analytical framework.[15] *No* amount of evidence of purposeful discrimination—short of direct evidence that the proffered reasons were lies—could overcome a prior determination that the proffered neutral reasons are "self-evidently" credible and therefore innocent in their intent.

Of equal importance to the public's confidence in the judicial system, and thus the ability of judges and prosecutors to administer that system, is the Fifth Circuit's departure from the rule that courts adhere to precedents. That rule "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). The supremacy of the law of the Constitution as announced by this Court, and the principle that lower courts follow these decisions, are integral to the conception of the "judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 403 (1970). As this Court has warned, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

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[15] Indeed, the Fifth Circuit's declaration that the prosecutors' race-neutral justifications for striking African-American jurors are "self-evident[ly]" credible could be seen to preclude the use of circumstantial evidence to prove purposeful discrimination. Circumstantial evidence was expressly declared relevant by this Court in *Batson*. 476 U.S. at 93 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such *circumstantial* and direct evidence of intent as may be available'") (emphasis added) (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Because the Fifth Circuit not only ignored the Court's carefully constructed analytical framework for assessing claims like petitioner's, but also created a rule that fundamentally departs from this Court's precedents in *Purkett*, *Hernandez v. New York*,[16] and *Batson* itself, reversal is warranted.

B. On Remand, The Fifth Circuit Improperly Evaluated Petitioner's Claim.

In *Miller-El I*, this Court provided substantial guidance to the Fifth Circuit as to how it should approach its task to determine whether petitioner proved by "clear and convincing" evidence that the trial court erred in finding that no purposeful discrimination occurred during the selection of petitioner's jury. J.A. 23-27, 33-37. The Fifth Circuit's cursory and dismissive review of petitioner's evidence on remand ignored this Court's instructions. First, the Fifth Circuit failed to consider all of petitioner's evidence, despite this Court's clear instruction that all of the "facts and circumstances" (*id.* at 31-32) must be evaluated, and failed to address the reasonable inferences of purposeful discrimination that, as this Court pointed out, could be drawn from the evidence. Second, where it did consider petitioner's evidence, the Fifth Circuit improperly applied the standard of review required under 28 U.S.C. § 2254(d)(2) and (e)(1) to safeguard against arbitrary fact-finding.

Given the preeminence of the Court's first decision in this case and its careful analysis of petitioner's evidence, *amici*'s greatest concern lies with the damage that the Fifth Circuit's decision on remand will do to the public reputation and integrity of our court system. While federal review on habeas should be conducted only within the relevant statutory and constitutional limitations, that review must take place—and must be conducted with reasonable care—if the public is to have confidence in the fairness and integrity of criminal

[16] 500 U.S. 352 (1991) (plurality opinion).

convictions. Cf. *Strickler*, 527 U.S. at 281 (the goals of the criminal justice system are not met when a guilty man is convicted by constitutionally improper means). Public confidence in prosecutors and judges cannot be maintained when federal courts decline to grant relief for constitutional violations when, as here, it is plainly warranted under the appropriate standards of review.

1. The Fifth Circuit Contravened this Court's Decision in *Miller-El I* by Refusing to Consider the Totality of Petitioner's Evidence.

The third step in the *Batson* test requires the court to evaluate all of the circumstances surrounding the exercise of peremptory challenges to determine whether a party improperly used a peremptory challenge to strike a juror because of his or her race. *Batson*, 476 U.S. at 93. Courts must inquire into "'such circumstantial and direct evidence of intent as may be available.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 266). This Court has never placed a limit on what evidence can be considered during the third *Batson* step. The circuit courts that have addressed this issue have adhered to this Court's unequivocal directive to consider all of the circumstances surrounding the peremptory challenges when determining, in the third step of the *Batson* test, whether purposeful discrimination occurred. *See, e.g.*, *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (affirming requirement under *Batson* that a court should "assess the totality of the circumstances surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving discrimination"); *see also Collins v. Rice*, 365 F.3d 667, 685 (9th Cir. 2004), *petition for cert. filed*, No. 04-52 (U.S. July 7, 2004); *Riley v. Taylor*, 277 F.3d 261, 283-84 (3d Cir. 2001) (en banc); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *Coulter v. Gilmore*, 155 F.3d 912, 921-22 (7th Cir. 1998).

In *Miller-El I*, the Court reversed the denial of petitioner's COA, in part, because the Fifth Circuit failed to consider all of the circumstances surrounding the peremptory challenges. J.A. 31-32 ("[i]t goes without saying that . . . the facts and circumstances that were adduced in support of the prima facie case" are to be considered at Batson's third step). Indeed, the Court went to great lengths to reinforce the breadth of evidence that should be considered in analyzing whether a defendant has shown purposeful discrimination, explaining in *Miller-El I* that a *Batson* claim "can be supported by *any* evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based." *Id.* at 31 (emphasis added).[17] On remand, however, the Fifth Circuit ignored the Court's express directive:

a. Most remarkably, the Fifth Circuit did not once acknowledge that prosecutors used peremptory strikes to remove 91 percent of the eligible African-American prospective jurors and only 13 percent of the white jurors. This particular piece of evidence is significant in two respects: (1) it is powerful circumstantial evidence of discriminatory intent (2) that this Court itself took note of and

[17] In *Miller-El I*, J.A. 32, this Court cited *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141-49 (2000), which held that all evidence, including evidence used to establish a *prima facie* case, can be used to demonstrate purposeful discrimination in an action under Title VII of the Civil Rights Act of 1964. This Court has acknowledged that cases interpreting Title VII of the Civil Rights Act of 1964 are highly relevant in explaining the evidentiary rules that govern allegations of discrimination in jury selection in the post-*Swain* era. *Swain v. Alabama*, 380 U.S. 202 (1965). *See, e.g.*, *Purkett*, 514 U.S. at 768-69; *Hernandez*, 500 U.S. at 359-60 (plurality opinion); *Batson*, 476 U.S. at 94 n.18, 98 n.21. Like the *Batson* test, the test for employment discrimination using indirect evidence is a three-step test, where the ultimate burden of persuasion remains on the party challenging an action as discriminatory. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

concluded that "[h]appenstance is unlikely to produce this disparity." J.A. 33.

b. The Fifth Circuit also improperly dismissed the historical evidence as "less significant" because petitioner had "already met the burden under the first step of *Batson* and now must prove actual pretext in his case." J.A. 7. The Fifth Circuit declared, as a matter of law, that historical evidence of persistent, purposeful discrimination against African-Americans in jury service was less relevant in determining whether the prosecutors' race-neutral justifications were a pretext for purposeful discrimination. *Id.* This is the same error the Fifth Circuit made when this case first appeared before this Court in *Miller-El I*. *Id.* at 31-32. The totality of the circumstances *means* the totality of the circumstances, and a circumstance does not become less relevant in a *Batson* inquiry merely because it serves a dual purpose of establishing a prima facie case *and* proving purposeful discrimination. This Court found that the historical evidence of discriminatory practices in the Dallas County District Attorney's Office plainly cast doubt on the legitimacy of the prosecutors' use of peremptory challenges at the first step of the *Batson* test, and that it just as plainly cast doubt on the legitimacy of those strikes in the third step of the *Batson* inquiry. *Id.* at 36-37.[18] The Fifth Circuit's attempt to pigeon-hole the use of evidence to one step in the *Batson* inquiry would preclude judges from fulfilling their "duty to determine if the defendant has established purposeful discrimination" by

[18] Moreover, this historical evidence was inextricably intertwined with the conduct of the prosecutors in selecting the jury at petitioner's trial. *Both* of petitioner's prosecutors had been members of the Dallas County District Attorney's Office when that agency formally trained its lawyers to exclude minorities from jury service, and one of the prosecutors had been found by a Texas appellate court to have engaged in race-based jury selection in another capital trial. J.A. 37. This crucial aspect of petitioner's historical evidence led to this Court's "supposition that race was a factor" in the prosecution's jury selection methods. *Id.* Yet, the Fifth Circuit ignored this evidence entirely in its opinion.

considering all of the circumstances that touch upon the credibility of the prosecutors' explanations for the peremptory challenges. *Batson*, 476 U.S. at 98; *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (evidence of purposeful discrimination should not be "pigeon-holed" but should assist the trier of fact "in determining overall intent").

c. The Fifth Circuit disregarded specific conclusions drawn by this Court—readily apparent from its threshold inquiry—that "[d]isparate questioning did occur" and that the manipulative questioning regarding the minimum punishment for murder was almost exclusively directed at African-Americans who expressed ambivalence about the death penalty. J.A. 34-35. Likewise, the Fifth Circuit improperly dismissed circumstantial evidence in addressing the issue of disparate questioning, departing again from this Court's guidance in *Miller-El I* that "'under some circumstances proof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'" *Id.* at 36 (quoting *Batson*, 476 U.S. at 93).

In sum, the Fifth Circuit failed to consider all of the circumstances presented by petitioner, and the reasonable inferences therefrom, contravening this Court's analysis of the evidence and its instructions on remand. Refusing to consider the totality of the circumstances renders unreasonable the Fifth Circuit's determination that the trial court did not err in finding no purposeful discrimination. *Cf. Williams v. Taylor*, 529 U.S. 362, 397 (2000) (the Virginia Supreme Court's determination of prejudice on ineffective assistance of counsel claim under § 2254(d)(1) was "unreasonable insofar as it failed to evaluate the totality of the available . . . evidence"). Moreover, such selective consideration of the evidence severely undermines public confidence in the judicial system as a forum to vindicate and remedy equal protection violations.

2. The Fifth Circuit's Divide-and-Conquer Approach Did Not Properly Evaluate Whether Petitioner Presented Clear and Convincing Evidence that the Trial Court Erred.

To the extent the Fifth Circuit addressed petitioner's evidence, it viewed each piece of evidence in isolation, finding that no *individual* item of evidence was "clear and convincing" proof that the trial court erred in finding no purposeful discrimination occurred. J.A. 7, 13, 14.[19] The Fifth Circuit's "divide-and-conquer" approach to the evidence effectively abandoned the statutory safeguards set forth in 28 U.S.C. § 2254(e)(1).

A determination under *Batson* that no purposeful discrimination occurred in the selection of a jury is a finding of fact. J.A. 30. Under the AEDPA, findings of fact by the trial court are "presumed to be correct," unless petitioner presents "clear and convincing" evidence in the federal habeas proceeding to rebut this presumption. 28 U.S.C. § 2254(e)(1). Whether a party has satisfied the "clear and convincing" burden of proof is determined by reviewing all of the evidence put forth by that party; each single piece of evidence is not required to satisfy the burden individually. *See, e.g., Colorado v. New Mexico*, 467 U.S. 310 (1984) (finding entire record of evidence presented to special master did not meet "clear and convincing" standard of proof necessary for state to obtain equitable apportionment of river water by diversion); *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (court determined that the "whole mass of

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[19] The Fifth Circuit's sole acknowledgement that it is required to undertake an analysis of the totality of petitioner's evidence appears at the conclusion of the opinion. The appellate court comments that petitioner's evidence does not indicate by clear and convincing evidence that the trial court erred "either collectively or separately." J.A. 17-18. But its opinion betrays no sign that the court of appeals actually undertook an examination of the totality of the evidence. *See id.* at 7, 13, 14.

evidence" in record below did not satisfy the "clear and convincing" standard of proof necessary to denaturalize a citizen).

The Fifth Circuit's treatment of petitioner's evidence concerning "jury shuffles" typifies its "divide-and-conquer" approach. Petitioner presented evidence that the prosecutors requested "jury shuffles" to alter the racial composition of the panel. Specifically, prosecutors requested "shuffles" when there were African-American jurors seated in the front of the panel in order to move the African-American jurors towards the back of the panel. There, they would likely never be questioned during voir dire and would therefore be excused at the end of the week, even though jury selection was still in progress. J.A. 25-26. Prosecutors also objected to the "purported inadequacy" of a defense shuffle but only "after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward," increasing the likelihood those jurors would be empanelled. *Id.* at 26. This Court concluded that this evidence "tended to erode the credibility" of the state's justifications, noting that its concerns were "amplified" by evidence that "the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past." *Id.* at 36. On remand, however, the Fifth Circuit mentioned only that the defense sought more "jury shuffles" than the prosecution, without addressing the manner, circumstances, or timing of any shuffle, and then concluded that the evidence concerning jury shuffles—and jury shuffles *alone*—was not "clear and convincing" evidence that the trial court erred in finding no purposeful discrimination occurred in the jury selection process. *Id.* at 7.

Courts cannot determine whether purposeful discrimination occurred in jury selection by considering "each piece of evidence . . . in isolation." *Riley*, 277 F.3d at 283. In determining purposeful discrimination in a party's use of peremptory challenges, "[t]he whole may be greater than the

sum of its parts," *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998), and the "ultimate determination on the issue of discriminatory intent [is] based on all the facts and circumstances." *Alvarado*, 923 F.2d at 256 (evidence should not be "pigeon-holed" but should assist the trier of fact "in determining overall intent").[20] Evidence of purposeful discrimination is often circumstantial rather than direct, and an intent to discriminate becomes apparent only when a court views all such circumstantial evidence together and in combination with each other piece. *See, e.g., Hernandez*, 500 U.S. at 363 (plurality opinion) ("'[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .'") (alteration in original) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).[21]

This Court recognized in *Miller-El I*, as it has before, that violations of constitutional rights are not rendered immune from judicial correction merely because they are bound up in the findings of fact by a lower court:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by the AEDPA, conclude the decision was unreasonable or that the

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[20] The "divide and conquer" strategy used by the Fifth Circuit here has been rejected by this Court in other contexts where courts are required to review the totality of the circumstances. *See United States v. Arvizu*, 534 U.S. 266, 274-75 (2002) (the Ninth Circuit's "divide-and-conquer" analysis of the evidence was inconsistent with the duty of the court of appeal to review the "'totality of the circumstances'" surrounding a *Terry* stop).

[21] The requirement that courts consider the totality of the circumstances to safeguard and enforce constitutional protections against discrimination is acknowledged in other contexts involving racial discrimination. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (existence of "'hostile'" or "'abusive'" environment under Title VII "can be determined only by looking at *all the circumstances*") (emphasis added).

factual premise was incorrect by clear and convincing evidence.

J.A. 31.[22] Arbitrary findings of fact, either that discrimination has occurred or that discrimination has not occurred, should not be insulated from judicial review and remedy, for the public's confidence in the fair and equal administration of justice is diminished when criminal convictions are allowed to stand on arbitrary findings of fact. The Fifth Circuit's "divide-and-conquer" approach compartmentalized each piece of evidence for consideration, rather than weighing the "clear and convincing" nature of *all* of the evidence against the trial court's final conclusion. The result of this unfair contest gives "deference" to factual determinations that is neither sanctioned by this Court nor tolerable under § 2254.

While this case is a benchmark, the nature of the benchmark remains undetermined. The Fifth Circuit's revision of step three of the *Batson* inquiry risks insulating invidious discrimination by "'those . . . of a mind to discriminate,'" *Batson*, 476 U.S. at 96, by eliminating the role and duty of judges—whether at trial or on direct or collateral review—to gauge the credibility of the explanations for peremptory challenges based on the totality of the evidence. Unless these explanations can be tested against the weight of all the evidence, it becomes impossible to "erode the credibility of the [opponent's] assertion" sufficient to carry the ultimate burden of persuasion. J.A. 36; *see also Hernandez*, 500 U.S. at 369 (plurality opinion). The result,

[22] *See also Norris v. Alabama*, 294 U.S. 587, 589-90 (1935):

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.

exemplified by the outcome on remand, is that meritorious *Batson* challenges become a futile exercise.

* * * *

Judges and prosecutors must each day contend with a public that only tentatively places its trust in our judicial system. The Court's decisions in *Batson* and *Miller-El I* help secure the public's confidence in the criminal justice system, and the judges and prosecutors responsible for its administration. A decision like the Fifth Circuit's, however, will have a negative effect on the day-to-day activities of our colleagues charged with making this system work. The Fifth Circuit's alteration of the *Batson* inquiry, and its departure from the Court's decision and analysis in *Miller-El I*, warrants reversal and a grant of relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Fifth Circuit and grant petitioner a new trial.

Respectfully submitted,

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APPENDIX

AMICI CURIAE

The Honorable Arlin M. Adams served as a judge of the United States Court of Appeals for the Third Circuit from 1969 to 1987, and as Director of the Federal Judicial Center from 1986 to 1987. He served as an Independent Counsel from 1990 until 1995. He is currently of counsel to the law firm Schnader Harrison Segal & Lewis LLP in Philadelphia, Pennsylvania.

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The Honorable John Gibbons is the former Chief Judge of the United States Court of Appeals for the Third Circuit. He served on that court from 1970 until 1990. He is currently a partner in the law firm Gibbons, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey.

The Honorable Eric H. Holder, Jr. served as Deputy Attorney General of the United States from 1997 until 2001, and as U.S. Attorney for the District of Columbia from 1993 until 1997. He also served as Associate Judge of the Superior Court of the District of Columbia from 1988 until 1993. He is currently a partner in the law firm Covington & Burling in Washington, D.C.

The Honorable Timothy K. Lewis served as a judge on the United States Court of Appeals for the Third Circuit, and as a

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Robert S. Litt served as Assistant U.S. Attorney for the Southern District of New York. He also served five years as Principal Associate Deputy Attorney General and Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice. Prior to that, he clerked for the Honorable Potter Stewart on the U.S. Supreme Court. He is currently a partner in the law firm Arnold & Porter in Washington, D.C.

Ralph J. Martin II is the former Suffolk County (Massachusetts) District Attorney, having served as the elected chief law enforcement official for Boston, Chelsea, Revere and Winthrop from 1992-2002. He also served as the Chair of the American Bar Association's Criminal Justice Section Council from 1999-2001. Mr. Martin is currently a partner in the law firm Bingham McCutchen LLP and Managing Director of Bingham Consulting Group. He is also chair of the Firm's Diversity Task Force.

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The Honorable William S. Sessions served as Director of the Federal Bureau of Investigation from 1987 until 1993, as Chief Judge of the U.S. District Court for the Western District of Texas from 1980 until 1987, and as a judge of the U.S. District Court for the Western District of Texas from 1974 until 1980. He also served as U.S. Attorney for the Western District of Texas from 1971 until 1974. He is currently a partner in the law firm Holland & Knight LLP in Washington, D.C.

Jeffrey E. Stone served in the office of the U.S. Attorney for Chicago for five years. He also served as counsel to the Illinois Judicial Inquiry Board. He has served as an adjunct professor at Northwestern University School of Law and is currently a partner in the law firm McDermott Will & Emery in Chicago, Illinois.

Beth A. Wilkinson formerly served as an Assistant United States Attorney for the Eastern District of New York from 1991 until 1995, Counsel to the Deputy Attorney General in 1995, and as a Special Attorney to the U.S. Attorney General for *United States v. McVeigh* from 1996 until 1998. She is currently a partner in the law firm Latham & Watkins in Washington, D.C.

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IN THE
Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LEAGUE OF WOMEN VOTERS OF THE UNITED STATES and COMMON CAUSE, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities i

Interest of *Amici Curiae* 1

ARGUMENT 3

Conclusion 6

Table of Authorities

Cases:

Alexander v. Louisiana,
405 U.S. 625 (1972) 1

Batson v. Kentucky,
476 U.S. 79 (1986) 1

Carter v. Jury Commission,
396 U.S. 320 (1970) 1

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 1

Georgia v. McCollum,
505 U.S. 42 (1992) 1

Ham v. South Carolina,
409 U.S. 524 (1973) 1

Table of Authorities (continued)

Page

Cases (continued):

J.E.B. v. Alabama ex. rel. T.B.,
511 U.S. 127 (1994) 2

Johnson v. California,
540 U.S. ___ (2004) 1

Miller-El v. Cockrell,
537 U.S. 322 (2003) 1, 2, 3n

Swain v. Alabama,
380 U.S. 202 (1965) 1

Turner v. Fouche,
396 U.S. 346 (1970) 1

Interest of *Amici Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Johnson v. California*, 540 U.S. ___ (2004), and in the prior proceedings in this case, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

advocacy. The League is organized in one thousand communities and in every state, with more than 120,000 members and supporters nationwide.

Founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States, the League has always worked to promote the values and processes of representative government. Working for open, accountable, and responsive government at every level; assuring citizen participation; and protecting individual liberties established by the Constitution — all reflect the deeply held convictions of the League of Women Voters.

The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens. Racial discrimination to block citizen participation in government offends the core values of the League and the American system of representative government. We believe that no person should suffer the effects of legal or administrative discrimination. The League participated as *amicus curiae* in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), the case that prohibited the exercise of peremptory challenges based on the gender of the juror, and in the earlier proceedings here, *Miller-El*, 537 U.S. 322.

Common Cause, Inc. was founded in 1970 as a nonpartisan advocacy organization that seeks to further the public interest. Common Cause has 250,000 members and supporters across the country and has organizations in 38 states, with a national office in Washington, DC.

Common Cause has worked throughout its 34-year history to ensure that the processes of government in all three branches are fair, open, and accountable to the public. It believes that racial discrimination in the selection of a jury, one of the fundamental processes of government, undermines our system

of justice and, more broadly, the underpinnings of our democratic form of government.

ARGUMENT

These *amici* filed a brief as *amici curiae* in this case on May 28, 2004 supporting review of the ruling below.[2] In that brief, we said:

> *Amici* urge the Court both to grant *certiorari* in this case, and also ultimately to grant Miller-El relief in his favor.
>
> *Batson v. Kentucky* and this Court's earlier decision in the present case, *Miller-El v. Cockrell*, required courts to give genuine attention to cleansing the criminal justice process of the taint of racial discrimination in jury selection. The response of the Fifth Circuit panel on remand in this matter, however, was to articulate new formulas — hardly differentiable from the old ones that this Court condemned — that excused patent race-based exclusion of an entire group of citizens from jury service.
>
> The decision below constitutes a dangerous precedent that can only invite cynicism and disrespect for the law. Despite clear guidance from this Court about the relevance of Miller-El's evidence of discrimination and the proper way of analyzing it, the court below conducted an analysis that dismisses, miscasts, and minimizes that evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone, proves discrimination.

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[2] LDF previously had submitted a brief as *amicus curiae* in support of Petitioner Miller-El when this matter was previously before this Court, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The result is that the panel dismissed proof of discrimination which can be characterized only as *undeniable*. The historic and continuing racially biased jury-packing behavior of the prosecutors in Miller-El's case was not at all subtle or discreet; it was open and notorious. Despite this Court's explicit directive to consider it, the panel substituted a curt dismissal of that history as inconsequential for its earlier view that it was irrelevant. As wrong as this was in Miller-El's case, it also signals the failure of the panel to comprehend this Court's determination to end racial bias in jury selection. The only way to put the history of racial discrimination in criminal justice behind us in this country is to acknowledge its reality and remedy its wrongs insofar as those remain correctable, not to write it off as insignificant.

Amici urge this Court to grant review and to reverse the decision below, which perpetuates racial discrimination by turning a blind eye to its manifest reality. Racial discrimination in the selection of juries injures not only the defendant and the African-American (or other) citizens who are excluded from service, but the entire community and the very authority of government. Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. If courts condone glaring racial discrimination in the courtroom, they teach the inevitable lesson that law is insincere or inept in its repeated avowals to afford equal justice to all.

When citizens of a defendant's race are disproportionately excluded from serving on his jury by the government officials prosecuting him, a legitimate perception of injustice arises. That perception cannot be dispelled by a perfunctory judicial review of his complaint of discrimination that inquires merely — as the panel did below — whether the prosecutors' articulated justifications

for excluding each individual minority juror, viewed out of context, are plausible. A more critical examination of the prosecutors' actions, which considers all probative information about the circumstances of their exclusionary behavior and the record of the actors engaging in it, is essential. This Court said as much in Miller-El's case last Term, and it should grant review again to make clear that it meant what it said.

The proof of racial discrimination in this case is as strong as courts are ever likely to see. *Amici* urge the Court to send an unequivocal message to the lower courts that such discrimination violates *Batson* and will not be tolerated.

(Brief of the NAACP Legal Defense and Educational Fund,d Inc., League of Women Voters of the United States and Common Cause, Inc. as *Amici Curiae* in Support of Petitioner, at 3-5 [footnote omitted].)

That brief exposed the fundamental legal error that the court below committed when it discarded the compelling evidence presented by Petitioner showing that prosecutors in Dallas County, Texas — where he was tried — regularly and repeatedly used peremptory strikes, in the years prior to his trial, to remove African-American prospective jurors from criminal trial panels. *See id.* at 5-11. It also catalogued the overwhelming evidence of prosecutors' misuse of peremptory strikes for the same purpose at Miller-El's trial, a showing that the court below could ignore or discount only by fashioning and applying "impossibly high — and erroneous — legal standards for proof of discrimination" (*id.* at 15). *See id.* at 11-17.

Amici respectfully urge this Court to review their earlier brief on the Petition in this matter as it considers the questions now before it on the merits, and to reverse the judgment below.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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